FILED
APR 28 1900
JAMES H. McKENNEY,
Clerk.

12 Orig.

IN THE

Supreme Court of the United States.

PETITION OF THE UNION STEAM-BOAT COMPANY.

Petition for a Writ of Mandamus.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
W. O. JOHNSON,
Proctors for Petitioners.

Geo. Hrnstein & Co., Printers, Chicago.

IN THE

Supreme Court of the United States.

Petition of the Union Steamboat Company for a writ of mandamus directed to the District Court of the United States for the Eastern District of Michigan, to set aside a decree in the case of Erie & Western Transportation Company vs. The Propellor "New York," The Union Steamboat Company, Claimant.

To the Honorable Judges of the Supreme Court of the United States:

The Union Steamboat Company, the petitioner, respectfully shows to this court as follows:

I. Your petitioner, the Union Steamboat Company, is a corporation and was at the time of the collision between the propellers "Conemaugh" and "New York" sole owner of the latter steamer.

II. That at the October Term, 1899, of this court, to wit, on the 19th day of October, 1899, the cause of the Union Steamboat Company, claimant of the propeller "New York," appellant, and the Erie & Western Transportation Company, libelant, *et al.*, was

heard, and on the 20th day of October, 1899, this court filed its opinion in said cause.

III. That on the 22d day of January, 1900, this court issued its mandate, directed to the District Court of the United States for the Eastern District of Michigan, to enter a decree in conformity with the opinion of this court, as will more fully appear from a certified copy of said mandate, attached hereto, marked "Exhibit A" and made a part of this petition.

IV That thereupon and on the 17th day of March, 1900, proctors representing the libelants, intervenors and claimants all of the parties interested in said suit, entered into a stipulation as to the several amounts constituting the damages in said cause, a certified copy of which stipulation is hereto attached, marked "Exhibit B," and made a part of this petition.

V. That on the 10th day of March, 1900, the said cause coming on to be heard in the said District Court, upon the decree to be entered in pursuance of the mandate above referred to, the petitioner submitted a proposed decree, and prayed that it might be entered in pursuance of said mandate, a certified copy of which is hereto attached, marked "Exhibit C," and made a part of this petition.

VI. That at the same time there was submitted by the said Erie & Western Transportation Company, on behalf of the libelants and intervenors in said cause, representing the Propeller Conemaugh and her cargo, a draft of a decree, which they prayed might be entered, a certified copy of which is hereto attached and marked "Exhibit D," and made a part of this petition.

And the court after hearing the arguments of the proctors, and on the 24th day of March, 1900, entered the last above named decree marked "Exhibit D," as the decree of the court, in pursuance of the provisions of the mandate above referred to.

VII. That the mandate in this cause provides for interest upon the various sums to be paid, in words as follows:

"With interest at the same rate per annum that "decrees bear in the courts of the State of Michigan."

That the District Court in pursuance of the said provision of the said mandate, directed that the various sums provided to be paid in said decree should bear interest at the rate of seven per cent. per annum, instead of 5 per cent. per annum, which it was contended on behalf the Union Steamboat Company, this petitioner, was the rate of interest that decrees bear in the courts of the State of Michigan.

VIII. That the said District Court further decreed, as will appear from "Exhibit D," that the libelant recover of the Union Steamboat Company one-half of all the costs in said cause in the District Court, and in the United States Circuit Court of Appeals for the Sixth Circuit, although it appears from the certified copy of the mandate issued by the said Circuit Court of Appeals for the Sixth Circuit to the said District Court in this cause under date of the 11th day of February, 1898, that the said Union Steamboat Company was the appellant in said Circuit Court of Appeals, and had paid all of the disbursements incurred upon its appeal from the District Court to the said Circuit Court of Appeals, as will more fully appear from a certified copy of the said mandate hereto attached marked "Exhibit E," and made a part of this petition.

IX. That the said District Court refused to permit the said Union Steamboat Company to recoup any sum that it might pay to the intervenors and owners of the cargo of the Steamer "Conemaugh" beyond a moiety thereof, against any sums that were due from the said Union Steamboat Company to the libelant for damages sustained by the Steamer "Conemaugh" and the owners of the cargo represented by the owner of the "Conemaugh" (and not represented by the intervenors), so that it was compelled to pay out of the total damage of $74,319.49, the sum of $52,788.77, instead of $32,817.94, being 76.5 per cent. of the total damage instead of 50 per cent. thereof.

X. That all of the damages arising out of said collision as shown by "Exhibit B" are fully provided for in the draft of the decree offered by this petitioner, and so distributed that the libelant as owner of the steamer "Conemaugh" and the petitioner as owner of the steamer "New York," each bear one-half of all the said damages, which we contend is in conformity with the mandate, and the opinion of this court referred to therein.

Wherefore, your petitioner prays that this Honorable Court will be pleased to grant the writ of *mandamus* in this case to the District Court of the United States for the Eastern District of Michigan, commanding it to set aside the decree entered in the said cause on the 24th day of March, 1900, and enter a decree dividing the damages agreed to equally so that this petitioner would not be decreed to pay more than one-half of the total damages arising out of the said collision, with interest thereon at a rate not exceeding the rate of 5 per cent. per annum from the 3d day of July,

1896, and that this petitioner be decreed to pay not more than one-half of the costs in the said Circuit Court of Appeals, and for such proceedings as shall seem just.

UNION STEAMBOAT COMPANY,
By Thomas T. Morford
Genl. agent

UNITED STATES OF AMERICA,
STATE OF Illinois
COUNTY OF Cook

Thomas T. Morford being duly sworn, deposes and says that he is the agent of the petitioner herein, The Union Steamboat Company; that the said petitioner is a corporation; that deponent has read the foregoing petition and that the same is true of his own knowledge, except as to the matters therein stated to be upon information and belief, and as to those matters he believes it to be true. Thomas T. Morford

Subscribed and sworn to before me this 11th day of April, 1900.

Robert J. Tolonie
Notary Public

Notarial Seal

We hereby certify that we have examined the fore going petition, and in our opinion the petition is well founded, and the case is one in which the prayer of the petition should be granted.

"EXHIBIT A."

UNITED STATES OF AMERICA } ss.

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Eastern District of Michigan:

GREETING—Whereas, lately in the United States Circuit Court of Appeals for the Sixth Circuit, in a cause between the Union Steamboat Company, claimant of the propeller New York, appellant, and the Erie and Western Transportation Company, libellant, and the British and Foreign Insurance Company, Limited; Insurance Company of North America; The Union Marine Insurance Company, and the Marine Insurance Company, Limited, intervening petitioners, appellees, wherein the decree of the said Circuit Court of Appeals entered in said cause on the 5th day of October, A. D. 1897, is in the following words: This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Michigan, and was argued by counsel.

On consideration, whereof, it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in said cause be and the same is hereby reversed with costs, and the cause is remanded to the court whence it came, with directions to dismiss the libel of the owners of the Conemaugh, and the petition of the intervening insurance companies, and to enter a decree *in personam* in favor of the owners of the New York against the owners of the Conemaugh for the agreed damage to the New

York," as by inspection of the transcript of the record of the said United States Circuit Court of Appeals, which was brought into the Supreme Court of the United States by virtue of a writ of *certiorari*, agreeably to the Act of Congress in such case made and provided, fully and at large appears.

And, whereas, in the present term of October, in the year of our Lord one thousand eight hundred and ninety-nine, the said cause came on to be heard before the said Supreme Court on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said United States Circuit Court of Appeals in the cause be and the same is hereby reversed; the claimants of the Conemaugh and the claimant of the New York each to pay one half of all costs in this cause.

And that the said Erie & Western Transportation Company recover against the Union Steamboat Com $276.75 for one half of the costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this court, with interest at the same rate per annum that decrees bear in the courts of the State of Michigan.

DEC. 7th, 1899.

You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of *certiorari* notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of January, in the year of our Lord, one thousand nine hundred.

[SEAL] JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

I, Darius J. Davison, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the foregoing is a true copy of a mandate of the Supreme Court of the United States, filed in my office, on the 24th day of January, 1900, and of the whole thereof, and that a decree in accordance with said mandate was entered in said District Court on the 24th day of March, 1898, at the City of Detroit in said District.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Detroit in said District, this 27th day of March, 1900.

D. J. DAVISON,
[SEAL] *Clerk.*

"Exhibit B."

The District Court of the United States for the Eastern District of Michigan.

The Erie and Western Transportation Company, Owner of the Propeller Conemaugh, *Libellant.* The British and Foreign Marine Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, *Intervenors.* *vs.* The Propeller "New York," The Union Steamboat Company, *Claimant.*	*In Admiralty.*

It is hereby stipulated that the losses sustained by the parties to this cause by the collision between the said Propellers Conemaugh and New York, with interest to July 3, 1896, shown by the record in said cause, are as follows:

Erie and Western Transportation Company, Owners of Propeller Conemaugh.....	$30,508.46
Erie and Western Transportation Company, Trustee for Underwriters on Cargo, other than intervenors.....	19,627.67
British and Foreign Marine Insurance Company, Limited.....	2,421.84
The Insurance Company of North America,	7,950.09
The Union Marine Insurance Company....	8,553.06

The Marine Insurance Company, Limited,	916.57
Union Steamboat Company, Owners Propeller New York	4,341.80
Total losses,	$74,319.49

HARVEY D. GOULDER,
Proctor for Libellant.
F. H. CANFIELD,
G. L. CANFIELD,
Proctors for Intervenors.
CHAS. E. KREMER and
WISNER & HARVEY,
DATED, March 17, 1900. *Proctors for Claimant.*

I, Darius J. Davison, Clerk of the District Court of the United States for the Eastern District of Michigan, do hereby certify that the foregoing is a true copy of a stipulation in the above entitled cause, filed in my office on the 21st day of March, 1900, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Detroit, in said District, this 27th day of March, 1900.

[SEAL] D. J. DAVISON, *Clerk.*

"EXHIBIT C."

THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

The Erie & Western Transportation Company, owner of the Propeller Conemaugh, *Libellant;* The British & Foreign Marine Insurance Company, Limited; The Insurance Company of North America; The Union Marine Insurance Company, and the Marine Insurance Company, Limited, *Intervenors,* vs. The Propellor "New York," The Union Steamboat Company, *Claimant.*	*In Admiralty.*

On reading and filing the mandate of the Supreme Court in this cause, bearing date January 22, 1900, and in obedience to said mandate, and in accordance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said Propeller "CONEMAUGH" and the said Propeller "NEW YORK" were both at fault for the collision set forth in the pleadings in this cause, and that the damages resulting therefrom to the said libellant, the owners of the cargo of the Conemaugh and underwriters thereon, the intervening petitioners, and the claimant of the Propeller New York, be equally divided between the said Erie & Western Transportation Company and the said Union Steamboat Company.

It is further ordered, adjudged and decreed that the

damages resulting from said collision, together with interest thereon to July 3, 1896, amount to the sum of $74,319.49, and are payable to the following named, and in the following proportion, viz.:

Union Steamboat Company, damage to New York	$ 4,341.80
Erie & Western Trans. Co., damage to Conemaugh	30,508.56
Erie & Western Trans. Co., Trustee for owners of cargo and underwriters other than intervenors	19,627.67
British & Foreign Marine Ins. Co., Lim., Intervenors	2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

And it appearing that the above named intervenors were insurers of portions of the cargo of the Conemaugh and that they have suffered damages on account of said collision as follows, viz:

British & Foreign Insurance Co	$2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and the American Surety Company, its surety, their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of 5 per cent per annum from the 3d day of July, 1896, until paid; and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for the intervenors, the damages and interest aforesaid, and that in default thereof, the said intervenors have executions therefor.

And it further appearing that the Erie and Western Transportation Company, as trustee for the underwriters and owners of the cargo of the Conemaugh, has suffered damage by the said collision in the sum of $19,627.67, and that the Erie and Western Transportation Company, as owner of said propeller Conemaugh, has suffered damage by the said collision in the sum of $30,508.46, in all amounting to the sum of $50,136.13, it is further ordered, adjudged and decreed that the said Erie and Western Transportation Company, for itself, and as trustee, recover from the said Union Steamboat Company and its surety one-half of the aforesaid sum of $50,136.13, less one-half of the sum of $19,841.56, hereinbefore decreed to be paid by the said Union Steamboat Company to the intervening petitioners above named, as insurers of the cargo of the said steamer Conemaugh, amounting to the sum of $9,920.78, and the further sum of $2,170.90, being one-half of the damages sustained by said steamer New York, amounting to the sum of $12,976.38, with interest thereon at the rate of 5 per cent. per annum, from July 3, 1896, until paid; and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for said Erie and Western Transportation Company, the said sum of $12,976.38, with interest as aforesaid, and that in default thereof that it have execution therefor.

It is further ordered, adjudged and decreed that the said Erie and Western Transportation Company recover from the Union Steamboat Company, and its surety, the sum of $84.12, being one-half of the costs of the Supreme Court; $276.75, less one-half of the costs of the Circuit Court of Appeals, $192.63, and

further that said Erie and Western Transportation Company do recover from the Union Steamboat Company and its surety one-half of the costs in this court to be taxed, and that in default in the payment of any of said sums that the said Erie and Western Transportation Company have executions therefor against the said Union Steamboat Company and the American Surety Company.

"Exhibit D."

The District Court of the United States for the Eastern District of Michigan.

The Erie & Western Transportation Company, owner of the Propeller Conemaugh, *Libellant*, The British & Foreign Marine Insurance Company, Limited, The Insurance Company of North America, The Union Marine Insurance Company, and The Marine Insurance Company, Limited, *Intervenors*, *vs.* The Propeller New York, The Union Steamboat Company, *Claimant*.	*In Admiralty.*

On reading and filing the mandate of the Supreme Court in this cause, bearing date the 22d day of January, in the year of our Lord one thousand nine hundred, and in obedience to said mandate and in consonance with the opinion of the Supreme Court therein, it is now ordered, adjudged and decreed, that the said Propeller Conemaugh and the said Propeller New York were both in fault for the collision set forth in the pleadings in this cause, and that the damages to said vessels and their owners resulting therefrom be equally divided between said Erie and Western Transportation Company and the said Union Steamboat Company:

And it is further ordered, adjudged and decreed, that the underwriters and owners of the cargo of said

Propeller Conemaugh recover the full amount of their damages against the said Union Steamboat Company and the American Surety Company of New York, its surety upon the bond or stipulation herein filed, with interest at the rate of seven per cent. per annum (that being the rate per annum that judgments and decrees bear in the courts of Michigan under the statute of said state), from the third day of July, 1896, until paid:

And it appearing that the above named intervenors were insurers of portions of said cargo and that they have suffered damages on account of said collision, as follows, to wit:

The British and Foreign Marine Insurance Company, Limited, in the sum of....	$2,321.84
The Union Marine Insurance Company, in the sum of.....	8,553.06
The Marine Insurance Company, Limited, in the sum of.....	916.57
The Insurance Company of North America, in the sum of	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and its surety their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate of 7 per cent. per annum from the 3d day of July, 1896, until paid, and that the said Union Steamboat Company and the American Surety Company pay into court, or to the proctors for said intervenors, the damages and interest aforesaid, and that in default thereof the said intervenors have executions therefor.

And it further appearing that the owners of said cargo and their underwriters, other than the inter-

venors, have suffered damage by said collision in the sum of $19,627.67, for which the said Erie and Western Transportation Company appears in this suit as trustee only, it is further ordered, adjudged and decreed that said trustee recover from the said Union Steamboat Company, and its surety, in trust, for the said owners of and underwriters on cargo, the aforesaid sum of $19,627.67, with interest thereon at the rate of 7 per cent. per annum from July 3, 1896, until paid, and that it have execution therefor.

And it is further ordered, adjudged and decreed that the said Erie and Western Transportation Company recover from the said Union Steamboat Company and its surety aforesaid, the sum of $13,219.52 (being one-half of the damage to said Conemaugh, less one-half of the damage suffered by the said New York in said collision), together with interest thereon at the rate of seven per cent. per annum from July 3, 1896;

And it is also decreed that the said libellant recover of the said claimant and its surety $276.75, as one-half of the costs of said cause in the Supreme Court, and also one-half of all costs of said cause in this court and in the United States Circuit Court of Appeals for the Sixth Circuit;

And it is further ordered that if default be made in the payment of any of said sums, executions issue therefor against the said claimant and its surety aforesaid.

HENRY H. SWAN,
District Judge.

I, Darius J. Davison, Clerk of the District Court of the United States for the Eastern District of Mich-

igan, do hereby certify that the foregoing is a true copy of a decree entered in the above entitled cause on the 24th day of March, 1900, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Detroit, in said district, this 27th day of March, 1900.

D. J. Davison,

[SEAL] *Clerk.*

"Exhibit E."

United States Circuit Court of Appeals, for the Sixth Circuit.

United States of America, } ss.
Sixth Judicial Circuit. }

The President of the United States, To the Honorable the Judge of the District Court of the United States for the Eastern District of Michigan:

Greeting: Whereas, lately in the District Court of the United States for the Eastern District of Michigan, before you, or some of you, in a cause between the Erie & Western Transportation Company, Libellant, and the Propeller New York, her engines, etc., respondent, wherein a decree was entered in favor of said libellant and against the Propellor New York, the Union Steamboat Company, claimant, as by the inspection of the transcript of the record of the said District Court which was brought into the United States Circuit Court of Appeals for the Sixth Circuit, by virtue of an appeal agreeably to the act of Congress in such case made and provided, fully and at large appears;

And Whereas, in the present term of October in the year of our Lord one thousand eight hundred and ninety-seven, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit on said transcript of record and was argued by counsel;

On consideration whereof it is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be and the same

is hereby reversed with costs, and the cause is remanded to the court whence it came, with directions to dismiss the libel of the owner of the Conemaugh and the petition of the intervening insurance companies and to enter a decree *in personam* in favor of the owner of the New York against the owner of the Conemaugh for the agreed damage to the New York.

You therefore are commanded that such proceedings be had in said cause in conformity with the opinion and decree of this court as according to right and justice, and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eleventh day of February, in the year 1898.

FRANK O. LOVELAND,
Clerk of the United States Circuit Court of Appeals for the Sixth Circuit.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Propeller "New York," v. Erie & Western Transportation Company	No. 461, Oct. Term, 1897.

STATEMENT OF COSTS.

Clerk's Costs	$ 33.80
Cost Printing Record	331.46
Attorney docket fee	20.00
	$385.26

I, Darius J. Davison, Clerk of the District Court of

the United States for the Eastern District of Michigan, do hereby certify that the foregoing is a true copy of a mandate of the United States Circuit Court of Appeals for the Sixth Circuit, filed in my office on the 13th day of February, 1898, and of the whole thereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Detroit in said District this 27th day of March, 1900.

D. J. Davison,
Clerk.

[SEAL.]

MAY 4 1900
JAMES H. McKENNEY,
Clerk.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 12, Original.

EX PARTE, IN THE MATTER OF THE UNION STEAMBOAT COMPANY,

PETITIONER.

Answer of the Judge of the District Court of the United States for the Eastern District of Michigan, to the Order to Show Cause why a Writ of Mandamus should not be issued.

H. D. GOULDER,
F. H. CANFIELD,
Counsel.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1900.

IN THE

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER of the petition of the Union Steamboat Company, Claimant, for a writ of mandamus directed to the District Court of the United States for the Eastern District of Michigan to set aside a decree in the case of the Erie & Western Transportation Company vs. The Propeller "New York," the Union Steamboat Company, Claimant.

To the Honorable the Justices of the Supreme Court of the United States:

In compliance with the order made by this Honorable Court, requiring this respondent to show cause why a writ of mandamus should not issue, which order is dated the 23d day of April, 1900, I, Henry H. Swan, Judge of the said District Court of the United States for the Eastern District of Michigan, do respectfully certify and return:

1. That the mandate of the Supreme Court in the case of the Erie & Western Transportation Company, libelant, the British & Foreign Marine Insurance Company, Limited, the Insurance Company of North America, the Union Marine Insurance Company and the Marine Insurance Company, Limited, Intervenors, vs. The Propeller "New York," the Union Steamboat Company, Claimant, mentioned in the petition upon which said order to show cause was granted, was filed in said District Court on the 24th of January, 1900.

2. That on the 17th day of March, 1900, said cause came on to be heard in the said District Court as to the decree to be entered in pursuance of said mandate, at which hearing all the parties were represented by their respective proctors; that the proctors for the said Erie & Western Transporation Company, libelant, and its cestuis que trust, the underwriters on cargo who had not separately intervened, and the proctors for the intervening insurance companies then submitted a proposed decree and asked that the same might be entered; that Exhibit "D," attached to said petition, is a copy of said proposed decree, except that the amount due to the said British & Foreign Marine Insurance Company, Limited, is $2,421.84 instead of $2,321.84, as stated in said Exhibit "D," and that the amount decreed to be paid to the said Erie & Western Transportation Company in its own right is the sum of $13,083.33 instead of $13,219.52, as stated in said Exhibit "D."

3. That at the same time there was submitted by the proctors for the petitioner, the said Union Steamboat Company, a proposed decree which they prayed might be entered. I certify and return that Exhibit "C," mentioned in said petition and attached thereto, is not a correct copy of said proposed decree, in this, that the rate of interest mentioned in said proposed decree, as presented to the court, is seven per cent per annum, and not five per cent per annum, as stated in said Exhibit "C," as will appear by reference to Exhibit "X," hereto attached and made a part of this return, and which is the identical proposed decree which said proctors presented to the Court and asked to have entered.

4. That upon presenting their said proposed decree the proctors for the said Union Steamboat Company stated to the Court that the words, "the courts of the State of Michi-

gan," used in the mandate of the Supreme Court, ought to be construed as meaning the admiralty courts of the United States sitting in Michigan, and that as decrees in said courts of the United States bear, usually, interest at the rate of six per cent, the interest to be allowed in the decree then proposed to be entered should be at the rate of six per cent, but conceded that the rate of interest should be seven per cent, if "the courts of the State of Michigan" mentioned in said mandate should be construed as meaning the courts of the State of Michigan.

5. That it was at no time contended in behalf of the said Union Steamboat Company that the rate of interest that "decrees bear in the courts of the State of Michigan" was five per cent, or that the decree in this cause should bear interest at that rate. On the contrary, as already stated, it was conceded in behalf of the said Union Steamboat Company that decrees in the courts of the State of Michigan, under the statute of said State, bear interest at the rate of seven per cent per annum.

6. That subsequent to the submission of said proposed decrees, and on the 21st day of March, 1900, the proctors for the Union Steamboat Company filed in said cause and presented to the Court a stipulation as to the several amounts constituting the damages in said cause, shown by the record in said cause, a copy of which it attached to said petition and marked Exhibit "B."

7. That after carefully considering said mandate and the opinion of the Supreme Court in said cause, and the arguments of the proctors for the respective parties, and knowing that the District Court had no power to vary said mandate or examine it for any other purpose than execution, or to add to it, or give any other or further relief; and that it was its duty simply to enter a decree as directed by said mandate and in consonance with said opin-

ion of the Supreme Court, and believing that the decree which was presented by the respective proctors for the Erie & Western Transportation Company, and the said intervenors was, in accordance with the said mandate and the said opinion of the Supreme Court, this respondent, on the 24th day of March, 1900, directed said decree to be entered, which was accordingly done.

8. That interest on judgments and decrees in the courts of the State of Michigan is provided for by sections (4865 and 4866) of the Compiled Laws of the State of Michigan of 1897, Vol. 2, which are as follows:

"INTEREST ON JUDGMENTS, VERDICTS, ETC."

"(4865) Sec. 6. Interest may be allowed and "received upon all judgments at law, for the recov- "ery of any sums of money, and upon all decrees in "chancery for the payment of any sums of money, "whatever may be the form or cause of action or "suit in which such judgment or decree shall be ren- "dered or made; and such interest may be collected "on execution, at the rate of seven per centum per "annum: Provided, That on a judgment rendered "on any written instrument, having a different rate, "the interest shall be computed at the rate specified "in such instrument, not exceeding ten per centum."

"(4866) Sec. 7. In all actions founded on con- "tracts express or implied, whenever in the execu- "tion thereof any amount in money shall be liquid- "ated or ascertained in favor of either party, by ver- "dict, report or referees, award of arbitrators, or by "assessment made by the clerk of the court or by "any other mode of assessment according to law, it "shall be lawful, unless such verdict, report, award "or assessment shall be set aside, to allow and re-

"ceive interest upon such amount so ascertained or "liquidated, until payment thereof, or until judg- "ment shall be thereupon rendered; and in making "up and recording such judgment, the interest on "such amount shall be added thereto, and included "in the judgment."

9. It is shown by the record in the cause and by the aforesaid stipulation, as well as by the decree which was presented by the proctors for said petitioner, that the said Erie & Western Transportation Company appears in said cause in its own behalf as owner of the "Conemaugh," claiming damages suffered in its own right, amounting with interest to July 3d, 1896, to the sum of $30,508.58; and as bailee or trustee of a portion of the "Conemaugh's" cargo, insured by underwriters who have not themselves intervened, the damage to that portion of the cargo, amounting to the sum of $19,627.67; and that the damages to the underwriters, who have intervened in said cause, amounts to the sum of $19,841.56, making the total cargo damage, with interest to July 3, 1896, $39,469.23, for which cargo damage, according to the opinion of this Honorable Court, the "New York" is held liable, although both vessels were in fault for the collision.

10. It further appears that if the said Union Steamboat Company is entitled to recoup from the Erie & Western Transportation Company one-half of what said steamboat company is held liable to pay on account of the damage to the "Conemaugh's" cargo, to wit: $19,734.61, as well as one-half of the damage to the "New York," to wit: $2,170.90, which is allowed by the decree entered, in making the division of damages as between the two steamers, it would result in what is, substantially, an affirmative decree in favor of said Union Steamboat Company against the said Erie & Western Transportation Company for the

sum of $6,651.28, besides interest from July 3d, 1896. Such a decree this respondent did not feel authorized to enter, for the reasons: *First.* That he was not directed to make such a decree by anything contained in the mandate of the Supreme Court, and that to enter such a decree, would be going beyond the mandate and in violation thereof; and, *Second*, because such a decree is not warranted by the pleadings in said cause, which, as shown by the record thereof, consist of the original libel filed by the said Erie & Western Transportation Company and the several petitions filed by the underwriters above named against the "New York;" and the several answers of the said Union Steamboat Company to said libel and said petitions. A cross-libel was also filed by said Union Steamboat Company against the propeller "Conemaugh" *in rem* and process therein prayed for against said propeller; but no process was issued nor was the court asked to enter any order requiring the said Erie & Western Transportation Company to give security for the claim set up in said cross-libel under General Admiralty Rule 53, nor does it appear that any copy of said cross-libel was ever served, or any proceeding whatever had under the same; nor has the said Union Steamboat Company by any pleading filed in the cause claimed to recover or recoup any sum from the said Erie & Western Transportation Company *in personam*, or asked for any decree against the said Transportation Company by way of recoupment or otherwise; nor has any proceeding been had under General Admiralty Rule 59, or otherwise to bring either the steamer "Conemaugh" or the Erie & Western Transportation Company into the suit to respond for any loss or damage resulting from the collision in said cause.

It clearly appears from the opinion of the Supreme Court in this case that "the underwriters on the 'Conemaugh's' cargo are entitled to recover to the full amount of

their damages against the 'New York,' notwithstanding the 'Conemaugh' may also be in fault for the collision." And neither in the mandate nor in the opinion is there any direction that any part of such cargo damages should be recouped by the said Union Steamboat Company from said Erie & Western Transportation Company. It was claimed by the proctors for said Erie & Western Transportation Company that the cargo was being carried under bills of lading, which exempted said company from liability to the underwriters on said cargo.

The liability of said Erie & Western Transportation Company for the damages resulting to said cargo has never been asserted by any pleading in the cause, nor has the question of its liability for such damages ever been litigated.

For the reasons herein stated, and believing that, under the decision of the Supreme Court in the case of the Juniata, 93 U. S., 337, cited and approved by the court in its opinion in this case, whatever the rights of the Union Steamboat Company, claimant of the "New York," may be against the said Erie & Western Transportation Company by reason of the payment to the underwriters on the cargo of more than one-half of their loss, they must be settled in another proceeding, and that it cannot be done in this litigation, this respondent declined to enter the decree proposed by the proctors for the said Union Steamboat Company. He believes the decree which was entered in the case to be in accordance with the mandate of the Supreme Court; but, if in this respect he has erred, he will cheerfully and promptly comply with any order or decree which this Honorable Court may make in the premises, as he desires to render full and exact obedience to its mandate.

All of which is respectfully submitted.

Dated May 2d, 1900.

(Sgd) Henry R. Lacombe,

District Judge.

EXHIBIT "X."

The District Court of the United States for the Eastern District of Michigan—In Admiralty.

THE ERIE & WESTERN TRANSPORTATION COMPANY, Owner of the Propeller "CONEMAUGH,"
Libelant,
THE BRITISH & FOREIGN MARINE INSURANCE COMPANY, LIMITED,
THE INSURANCE COMPANY OF NORTH AMERICA,
THE UNION MARINE INSURANCE COMPANY, and
THE MARINE INSURANCE COMPANY, LIMITED,
Intervenors,

vs.

The Propellor "NEW YORK,"
THE UNION STEAMBOAT COMPANY,
Claimant.

On reading and filing the mandate of the Supreme Court in this cause, bearing date January 22, 1900, and in obedience to said mandate and in accordance with the opinion of the Supreme Court herein, it is now ordered, adjudged and decreed that the said propeller "Conemaugh" and the said propeller "New York" were both at fault for the collision set forth in the pleadings in this cause, and that the damages resulting therefrom to the said libelant, the owners of the cargo of the "Conemaugh" and underwriters thereon,

the intervening petitioners, and the claimant of the propeller "New York," be equally divided between the said Erie & Western Transportation Company and the said Union Steamboat Company.

It is further ordered, adjudged and decreed that the damages resulting from said collision, together with interest thereon to July 3, 1896, amount to the sum of $74,319.49, and are payable to the following named, and in the following proportion, viz:

Union Steamboat Company, damage to "New York"	$ 4,341.80
Erie & Western Trans. Co., damage to "Conemaugh"	30,508.46
Erie & Western Trans. Co., trustee for owners of cargo and underwriters other than intervenors	19,627.67
British & Foreign Marine Ins. Co., Lim., intervenors	2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

And it appearing that the above named intervenors were insurers of portions of the cargo of the "Conemaugh" and that they have suffered damages on account of said collision as follows, viz:

British & Foreign Insurance Co.	$2,421.84
Union Marine Insurance Company	8,553.06
Marine Insurance Company, Limited	916.57
Insurance Company of North America	7,950.09

It is further ordered, adjudged and decreed that the said intervenors severally recover from the said Union Steamboat Company and The American Surety Company, its surety, their several damages aforesaid, amounting in all to the sum of $19,841.56, with interest thereon at the rate

of seven per cent per annum from the 3d day of July, 1896, until paid; and that the said Union Steamboat Company and The American Surety Company pay into Court, or to the proctors for the intervenors, the damages and interest aforesaid, and that in default thereof, the said intervenors have executions therefor.

And it further appearing that the Erie & Western Transportation Company, as trustee for the underwriters and owners of the cargo of the "Conemaugh," has suffered damage by the said collision in the sum of $19,627.67, and that the Erie & Western Transportation Company as owner of said propeller "Conemaugh," has suffered damage by the said collision in the sum of $30,508.46, in all amounting to the sum of $50,136.13, it is further ordered, adjudged and decreed that the said Erie & Western Transportation Company, for itself, and as trustee, recover from the said Union Steamboat Company and its surety, one-half of the aforesaid sum of $50,136.13, less one-half of the sum of $19,841.56, hereinbefore decreed to be paid by the said Union Steamboat Company to the intervening petitioners above named, as insurers of the cargo of the said steamer "Conemaugh," amounting to the sum of $9,920.78, and the further sum of $2,170.90, being one-half of the damages sustained by said steamer New York, amounting to the sum of $12,976.38, with interest thereon at the rate of seven per cent per annum, from July 3, 1896, until paid; and that the said Union Steamboat Company and The American Surety Company pay into Court, or to the proctors for said Erie & Western Transportation Company, the said sum of $12,976.38, with interest as aforesaid, and that in default thereof, that it have execution therefor.

It is further ordered, adjudged and decreed that the said Erie & Western Transportation Company recover from the Union Steamboat Company and its surety the sum of

$84.12, being one-half of the costs of the Supreme Court, $276.75, less one-half of the costs of the Circuit Court of Appeals, $192.63, and further that said Erie & Western Transportation Company do recover from the Union Steamboat Company and its surety, one-half of the costs in this Court to be taxed, and that in default in the payment of any of said sums, that the said Erie & Western Transportation Company have executions therefor against the said Union Steamboat Company and The American Surety Company.

No. 12 Orig.

Brf. of Kremer, Wisner, Harvey & Johnson for Petitioner

Office Supreme Court
FILED
APR 23 1900
JAMES H. McKENNEY,
Clerk

Filed April 23, 1900.

Supreme Court of the United States.

In the matter of the petition of the Union Steamboat Company, claimants of the Steamer "New York," for a writ of mandamus directed to the Judge of the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR PETITIONER.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
W. O. JOHNSON,
Proctors for Petitioners.

Geo. Hornstein & Co., Printers, Chicago.

IN THE

Supreme Court of the United States.

In the matter of the petition of the Union Steamboat Company, claimants of the Steamer "New York," for a writ of mandamus directed to the Judge of the District Court of the United States for the Eastern District of Michigan.

BRIEF FOR PETITIONER.

On the evening of the 21st day of October, 1891, a collision occurred in the Detroit river between the steamers "Conemaugh" and "New York," resulting in the sinking of the steamer "Conemaugh." The Erie and Western Transportation Company filed its libel in the United States District Court for the Eastern District of Michigan against the New York to recover for the damages sustained by the Conemaugh and her cargo. By appeal the case was taken to the Circuit Court of Appeals.

It came on to be heard in this court upon a writ of *certiorari* on the 19th day of October, 1899, and on the 20th day of November following, the court

filed its opinion holding that both of the said steamers were at fault for the collision.

On the 22d day of January, 1900, the court issued its mandate to the Judge of the District Court of the United States for the Eastern District of Michigan, the concluding sentences of which are as follows:

"On consideration whereof, it is now ordered, adjudged and decreed by this court that the decree of the said United States Circuit Court of Appeals in the the cause be and the same is hereby reversed; the claimants of the Conemaugh and the claimant of the New York each to pay one half of all costs in this cause.

And that the said Erie and Western Transportation Company recover against the Union Steamboat Company, $276.75 for one-half of the costs herein expended and have execution therefor.

And it is further ordered that this cause be and the same is hereby remanded to the District Court of the United States for the Eastern District of Michigan, with direction to enter a decree in conformity with the opinion of this court, with interest at the same rate per annum that decrees bear in the courts of the State of Michigan.

DECEMBER 7, 1899.

You therefore are hereby commanded that such execution and further proceedings be had in said cause in conformity with the opinion and decree of this court, as according to right and justice and the laws of the United States ought to be had, the said writ of *certiorari* notwithstanding after this mandate reached the District Court."

The damages arising out of this collision were stipulated between the parties (as appears from the stipulation attached to and made a part of the petition in this case), as follows:

"It is hereby stipulated that the losses sustained by the parties to this cause by the collision between the said propellers Conemaugh and New York, with interest to July 3, 1896, shown by the record in said cause, are as follows:

Erie and Western Transportation Company, owners of propeller Conemaugh,	$30,508 46
Erie and Western Transportation Company, trustee for underwriters on cargo, other than intervenors	19,627 67
British and Foreign Marine Insurance Company, Limited	2,421 84
The Insurance Company of North America	7,950 09
The Union Marine Insurance Company	8,553 06
The Marine Insurance Company, Limited,	916 57
Union Steamboat Company, owners propeller New York	4,341 80
Total losses	$74,319 49

On the 24th day of March, 1900, after having had submitted to it by proctors for the "New York" and proctors for the "Conemaugh" proposed decrees, the District Court entered a decree, by the terms of which the Union Steamboat Company, as the owner of the propeller "New York," was to bear of the total damages of $74,319.49 the sum of $52,788.77, or 76.5 per cent., instead of $32,817.94, or 50 per cent. thereof, as will appear from the copy of the decree attached to this petition, marked "Exhibit C."

At the hearing in the District Court it was contended

by proctors for the "New York," that notwithstanding the finding of this court that the underwriters on the cargo of the "Conemaugh" could recover all of their damages from the "New York," the owner of the "New York" should be permitted to recoup or set off one half of the cargo damages against the claim of the libelant for damages sustained by the "Conemaugh" in the collision, so that the "Conemaugh" and "New York" would each pay one-half of the total damages.

It was further contended that the rate of interest upon the said damages at the rate that decrees bear in the courts of the State of Michigan, should not be to exceed 5 per cent. per annum instead of 7 per cent. as claimed and subsequently allowed by the District Court, contrary to law and the mandate.

It was further decreed by the District Court contrary to the mandate of this court, that the owners of the New York were to pay to the libelants one-half of the costs in the Circuit Court of Appeals, when these costs had already been paid by petititioner when it was the appellant in said Circuit Court of Appeals.

BRIEF.

I.

THE DISTRICT COURT ERRED IN NOT PERMITTING THE PETITIONER TO RECOUP A MOIETY OF THE DAMAGES TO THE CARGO OF THE "CONEMAUGH" AGAINST THE LIBELANT'S CLAIM FOR DAMAGES SUSTAINED BY IT AS OWNER OF THE "CONEMAUGH."

The mandate from this court concludes:

"You therefore are hereby commanded that such "execution and further proceedings be had in the said "cause in conformity with the opinion and decree of "this court, as according to right and justice and the "laws of the United States ought to be had, the said "writ of *certiorari* notwithstanding."

First. We contend on behalf of petitioner that under the law, practice and procedure in courts of admiralty, it is well settled, that in all cases of collision, when two vessels are concerned and both are found at fault, that the damages arising out of the collision be equally divided between the owners of the respective vessels, each paying half of the sum.

Second. We also contend that whenever one of the vessels in fault is compelled to pay the whole of the damages of a third or innocent party, that any amount above a moiety of such damages that shall be paid by such vessel, can be recouped or set off against any claim for damages that the other vessel may have sustained by reason of the collision, so that each vessel (if she be of sufficient value), pay one-half of all damages arising out of the collision.

Third. We contend that the law and practice in the courts of admiralty, although not specifically set out at length in the opinion or the mandate of this court, are a part of such mandate and that the District Court was therefore bound to follow such law and procedure in construing the mandate.

Fourth. We contend that all of the parties being before the court, either as libelants, claimants, or intervenors, the District Court was competent to adjust the equities between the parties and enter such a decree as would carry out the well settled law practice and procedure in admiralty in cases of this kind.

We therefore prepared on behalf of petitioner a decree which we believe is in harmony with the mandate and opinion of this court, and also the law and practice in courts of admiralty. The decree which we prepared will be found as "Exhibit D," attached to the petition for a writ of mandamus in this case.

The right to recoup or set off, as we contend for in this case has long been the settled law in courts of admiralty in this country. One of the earliest cases found in the books is that of "*The Eleanora*," 17 Blatch., 88.

In that case, the owners of the Schooner "Transit" and the owners of her cargo each filed a libel against the steamship "Eleanora" on account of a collision, which resulted in the loss of the schooner and cargo.

The court held that both the schooner and the steamer were at fault for the collision, and on page 104, the court, Chief Justice WAITE, says:

"Both vessels being in fault, as between themselve, the damages must be apportioned. Castner

"and others, who sue the 'Eleanora' alone, for the "cargo, are entitled, under the rule in the case of "*The Atlas* (93 U. S., 302), to a decree for the full "amount of their loss; and, as the Transit, if she had "been joined, would have been liable for one half of "this loss, *a credit may be allowed the Eleanora, on "the decree in favor of the owners of the Transit, for "a sum equal to one-half of the damages of the cargo.* "Although separate libels were filed by the owners "of the vessel and the owners of the cargo, they con- "stitute, in effect, but a single suit. They have been "heard together and submitted upon the same evidence. "Having all parties before it, the court may do what "it would have done if there had been but one libel, "that is to say, divide the damages of the collision "throughout between the two colliding vessels. A "*formal claim, to the effect, on the part of the "'Eleanora,' is not necessary.* It is rare that, in any "case, a defending vessel makes a demand for a di- "vision of damages. A complete defense is generally "insisted upon in the pleadings, and the apportion- "ment is made by the court, on the facts as they "are finally developed at the hearing. It is unneces- "sary to decide what the rule in this particular would "be if the Eleanora had not been subjected in the suit "for the cargo, because here she has been, and that, "too, upon the very testimony submitted in the suit "between the two vessels. The fund belonging to "the Transit, growing out of the collision, is in court, "and no injustice is done by using it to reimburse the "Eleanora for what she has paid for the Transit, on "account of the mutual fault of the two vessels."

Leonard v. *Whitwell*, 10 Ben., 638.

This was a libel *in personam* by the owners of the schooner "J. M. Leonard" against the owners of the steamship "Arragon" to recover the value of the schooner, her cargo and freight.

The court held both the schooner and the steamer at fault for the collision, and on page 658, Judge CHOATE says:

"The owners of the schooner have an undoubted "right to sue on behalf of the owners of the cargo for "its value. It would seem that, so sueing, their "rights as bailees must be as great as if the owners of "cargo joined as libelants. No final decree "should, therefore, it seems, be made which will give "the libelants a smaller amount as bailees than the "owners of the cargo would be entitled to receive. "* * * It seems to be unnecessary to make the "owners of the cargo parties, if that could be now "done. They are virtually before the court through "the libelants."

The C. H. Foster, 1 Fed. Rep., 733.

In this case the owners of the schooner "Helen Marr" filed their libel against the "C. H. Foster" for the loss of the vessel and her cargo, both of which were totally sost.

The court held both vessels at fault, and although the owners of the "Helen Marr" had limited their liability under Section 4283, the court found that the owners of the "Foster" could recoup one-half the damages paid to the cargo against the sum which was due from the "Foster" to the "Marr," and this without additional pleading.

In *re Leonard*, following the ruling of Judge Choate

in this case in 10 Ben., 638, the court holds that even though the limited liability proceedings had been taken on behalf of the schooner, the amount to be recovered from the offending steamer could be used as a fund to indemnify the steamer for what it had to pay on account of the damage to the cargo exceeding one half.

In the case of *Atlantic Mutual Ins. Co.* v. *Alexandre*, 16 Fed. Rep., 279, citing with approval the language of Judge Choate in 10 Ben., 638, the court on page 282, says:

"Upon the ascertainment of the damages to the respective parties, it will be competent for the court, following in principle the case of *The Eleanora*, 17 Blatchf., 105, to direct that the amount recoverable by the libelants in the suit *in rem* for the loss of the vessel and freight be first applied and paid in satisfaction of their own share of the loss of the owners of the cargo, or their representatives, the insurers, who are the libelants in the present suit, and be credited upon the claim in this suit. The claims of the respective parties would indicate a possibility that one-half of the loss of the cargo, for which the owners of the bark are answerable, may exceed the amount recoverable for the loss of the bark from the steamer. Should that prove to be the case, the libelants would be entitled to a judgment in this suit against the respondents, *in personam*, for the difference; and the latter, for their own indemnity, would be entitled to a decree against the libelants in the suit *in rem* for such excess."

The C. H. Foster, 1 Fed. Rep., 733.
The Canima, 17 Fed. Rep., 271.

This was a libel filed by the owner of the canal boat

"Redfield," and also a libel by the owner of her cargo of coal against the steamboat "Canima." The court found both vessels at fault, and on page 272 says:

"Duncan, the owner of the cargo, is entitled to re-"cover his whole damages, with costs, as in the case "of *The Atlas*, 93 U. S., 302. But as the steamship, "in paying the owner of the cargo, sustains damages "to that amount, she is entitled on payment to "offset this against the loss recoverable by the "owner of the canal boat, so far as that will go; or, "what comes to the same thing, the steamboat may "charge against the sum payable to the owner of the "canal boat the one-half of the damages to the cargo, "which the latter ought by reason of his negligence "to pay for the cargo, as in the case of *The Eleanora*, "17 Blatchf., 88, 105; *The C. H. Foster*, 1 Fed. "Rep., 733; *Leonard* v. *Whitwell*, 10 Ben., 638, "658; *Atlantic Mut. Ins. Co.* v. *Alexandre*, 16 Fed. "Rep., 279."

The Hercules, 20 Fed. Rep., 305.

In this case two libels were filed against the steamer "Hercules" for the total loss of a schooner and her cargo. The court held both vessels at fault, and on page 206 of the opinion, Judge LOWELL says:

"The claimants now ask that, from the damages "which would otherwise be due the owners of the "schooner, they should be permitted to deduct or re-"coup one-half of the value of the cargo, because each "party is liable for that loss, according to *The Atlas*, "93 U. S., 302. A recoupment of this sort has been "allowed in several cases. See *The Eleanora*, *su-"pra*; *Leonard* v. *Whitwill*, 10 Ben., 638; *The C. "H. Foster*, 1 Fed. Rep., 733; *In re Leonard*, 14

"Fed. Rep., 53; *Atlantic Ins. Co.* v. *Alexandre*, 16 "Fed. Rep., 279; *The Canima*, 17 Fed. Rep., 271. "That one vessel was wholly lost, does not prevent "a contribution in case of mutual fault. *The North* "*Star*, 106 U. S., 17; S. C., 1 Sup. Ct. Rep., 41."

The Job T. Wilson, 84 Fed. Rep., 149.

This was a libel by the owner of the tug "Wilson" against the steamship "Howard," and also an intervening petition by the owners of a scow in tow of the tug Wilson at the time of the collision.

The court held that the owners of the scow as innocent parties were entitled to recover from either the tug or the steamer, both having been held to be at fault for the collision, and on page 207 Judge Morris says:

"It seems to me a similar injustice would be "worked by permitting the owners of a vessel which "is primarily liable for only one half of the "damage of an innocent sufferer to be compelled "to pay the other half charged against the other ves- "sel, and yet refusing to allow the owners of the ves- "sel which has paid the whole to obtain the excess "out of the money in their hands payable to the "owners of the other vessel, for damages arising from "the same collision. The whole object, as it seems "to me, of the practice in admiralty, which enables "the court to deal with all the questions arising from "a collision as one transaction, is to prevent such in- "equitable results." *The City of New York*, 25 Fed. Rep., 149; *The Canima*, 17 Fed., 271; *The Hercules*, 20 Fed., 205.

Jacobsen v. *Springer*, 87 Fed. Rep., 948.

This was a collision between the Steamer "Argo"

and the Norwegian Steamship "Dumois." Petitions were also filed on behalf of people who were injured, and the Circuit Court of Appeals for the Fifth Circuit divided the damages, and on page 953 JUDGE PARDEE says:

"Finding, as we do, both the Dumois and Argo in "fault, the decree of the District Court must be re- "versed, and a new decree, adjusting the damages, "entered. The crew of the Argo who lost their ef- "fects by the collision are entitled to recover only "half their damages from the Dumois, and, as the "Argo was in fault, nothing from their own ship. "*The Queen*, 40 Fed. Rep., 694; *The City of Nor- "walk*, 55 Fed., 102. Hester and Blesine being pas- "sengers on board the Argo, and not in fault, their "representatives are entitled to recover full dam- "ages from the Dumois; but the Dumois is en- "titled to recoup half the damages so paid, and de- "duct the same from the amount awarded to the "owners of the Argo. *The Hercules*, 20 Fed., 205; "*The North Star*, 106 U. S., 17, 1 Sup. Ct., 41. The "Argo being a total loss, can recover one-half her "value from the Dumois, less one-half the damages "suffered by the Dumois, shown by the record to be "$185. Decreed accordingly."

The "Chatahoochee," 173 U. S., 540.
The "Niagara," 77 Fed. Rep., 329.

It seems to us, therefore, that the District Court erred in not permitting the owners of the "New York," the petitioner, to set off the amount that it had paid to the intervenors against any sum that was to be paid to the libelant both in the capacity of owner

of the "Conemaugh," and as trustee for the cargo that was not represented by the intervenors.

The District Court strictly construed the opinion of this court and also its quotation from the case of the "*Juniata*," 93 U. S., 337, and therefore practically held that the owner of the "New York" was compelled to resort to some separate proceeding at law or in admiralty to recover the amount that it had to pay more than its moiety of the damages in this case, and that it could not be done in this case.

It considered the opinion in the "*Juniata*" case as a part of the opinion in this case, and that this court by citing the case of the "*Juniata*" reiterated what was said in that case in reference to some future or other proceeding that might be required to collect the amount which the "New York" was compelled to pay more than its share of these damages.

We believe that the principle of law is well settled that there can be no contribution among *tort feasors*, and that this would debar the owners of the "New York" from recovering from the owners of the "Conemaugh" any part of the amount that they paid in this case, should it be compelled to resort to some other or separate proceeding. This would be a great hardship and we believe under the authorities entirely unnecessary.

The libelant in this case stands here as the owner of the "Conemaugh," with a claim of $30,508.46 for damages sustained by this vessel. As trustee for the owners of the "Conemaugh's" cargo, the libelant has a further claim of $19,627.67. The intervenors, the underwriters, are here with a further claim for

damages to the "Conemaugh's" cargo aggregating $19,841.56.

This last claim is the one this court referred to as the one which could be collected in its entirety of the "New York."

The District Court, however, not alone decreed that the New York pay this in full, but also the claim made by the libelant as trustee for owners of the cargo, for which no one has intervened.

In addition to paying these amounts in full, the District Court decreed the payment of one-half of the damages to the "Conemaugh" herself, less one-half of the "New York's" damages.

We asked that after paying the underwriters (intervenors) in full that we be allowed to recoup or set off against the claims of the libelant (as owner of the the "Conemaugh" and as trustee) one-half of the intervenor's damages, or $9,920.78, so that after paying the intervenors in full, $19,841.56, the "New York" would have to pay libelants (after deducting one-half of the "New York's" damages) the further sum of $12,976.38. This would bring out each of the vessels as paying $32,817.94, one-half of the total damages, and carry into effect the judgment of this court.

II.

WHAT RATE OF INTEREST SHOULD HAVE BEEN ALLOWED ON DAMAGES SUSTAINED BY THE PARTIES IN THIS CASE?

The mandate of the Supreme Court directs the District Court "to enter a decree in conformity with the "opinion of this court, with interest from July 3, "1896, until paid, at the same rate per annum that "decrees bear in the courts of the State of Michigan."

Section 3 of Chapter 6 of the Revised Statutes of Michigan of 1838, is as follows:

"The interest of money shall continue to be at the "rate of seven dollars and no more, upon one hundred "dollars for a year, and at the same rate for a greater "or less sum, and for a longer or shorter time. Pro- "vided, That in cases of money loaned it shall be law- "ful for the parties to stipulate in writing for the "payment of any interest not exceeding ten per cent. "per annum."

Section 8 of the same Chapter provides for interest on judgments, verdicts, etc., as follows:

"Interest may be allowed and received, upon all "judgments at law for the recovery of any sums of "money, and upon all decrees in chancery, for the "payment of any sums of money, whatever may be "the form or cause of action or suit in which such "judgment or decree shall be rendered or made, and "such interest may be collected on execution."

Section 8 was amended in 1855 (Session Laws 1855, p. 131) by adding the following: "at the rate of seven "per cent. per annum. Provided, that on a judg- "ment rendered on any written instrument having a

"different rate, the interest shall be computed at the "rate specified in such instrument, not exceeding ten "per centum."

The same provision is found in the Compiled Laws of 1857, Section 1317, Compiled Laws of 1871, Section 1635, Howell's Statutes, Section 1597, and Compiled Laws of 1897, Section 4865.

Section 3 was not amended until 1887, when the rate of interest was fixed at six per cent. per annum. S. L., 1887, p. 153.

In 1891 the Legislature passed an act entitled, "An "Act to regulate the interest of money on account, "interest on money, judgments, verdicts, etc.," as follows:

Section 1. The people of the State of Michigan enact, that the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for a greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent. per annum; provided, that this act shall not apply to existing contracts whether the same be either due, not due, or part due."

Section 4. "All acts or parts of acts contravening the provisions of this act are hereby repealed."

Act 156 of Session Laws of 1891, pages 197-8. (Compiled Laws, 1897, section 4,856.)

The Legislature of 1899 amended section 1 of the act of 1891, by fixing the legal rate of interest at five per cent. and permitting parties to contract for a rate not exceeding seven per cent.

Public Acts of 1899, Act 207, page 324.

The act went into effect October 3, 1899, and the language is as follows:

"The People of the State of Michigan enact:

"SECTION 1. That section one of act number one "hundred fifty-six of the public acts of eighteen hun- "dred ninety-one entitled 'An Act to Regulate the In "terest of Money on Account, Interest on Money, "Judgments, Verdicts, etc.,' the same being com "pilers section one thousand five hundred ninety-four "of volume three of Howell's Annotated Statutes, and "Section four thousand eight hundred ninety-seven, be "and the same is hereby amended to read as follows:

"SECTION 1. The People of the State of Michigan "enact: That the interest of money shall be at the rate "of five dollars upon one hundred dollars for a year, "and at the same rate for a greater or less sum, and "for a longer or shorter time, except that in all cases "it shall be lawful for the parties to stipulate in writing "for the payment of any rate of interest not exceeding "seven per cent. per annum; provided that this act "shall not apply to existing contracts whether the same "be either due, not due or part due."

Approved May 25, 1899.

It will be observed that in the first act authorizing interest on judgments, verdicts, etc., the rate of interest was not stated. In 1855 the Legislature fixed the rate at 7 per cent., the then legal rate of interest. It was evidently never intended that judgments, verdicts or decrees should bear a higher rate of interest than the legal rate, except in cases where the instrument upon which suit was brought bore a higher rate.

While Section 8 is found in both Howell's Statutes and the Compiled Laws of 1897, providing for 7 per

cent. interest on judgments, verdicts, etc., it is clear that Section 4 of the act of 1891 repealing all acts or parts of acts contravening the provisions of Section 1 fixing the legal rate of interest at 6 per cent., repealed that part of Section 8 which conflicted with the provisions of Section 1.

The Act of 1899, which was in force at the time of the filing of the mandate of the Supreme Court in this cause, fixes the rate of interest at 5 per cent.

The absurdity of the proposition that it was the intention of the law makers that judgments, verdicts and decrees should bear a higher rate of interest than the legal rate is shown by the following: Assume that the legal rate of interest is 5 per cent., a note without the interest rate specified would bear interest at the rate of 5 per cent. up to the time of judgment, and thereafter, if Section 8 is still in force, at the rate of 7 per cent., whereas if the note specified the legal rate, after judgment the interest would be at the same rate, on account of the provision that if judgment is rendered on any written instrument having a different rate, the interest shall be computed at the rate specified in such instrument.

It is submitted that the section fixing the rate of interest on judgments, verdicts, etc., was amended by the acts of 1891 and 1899, and that judgments, verdicts, etc, now bear the legal rate of interest, viz., five per cent.

III.

INTEREST IN ADMIRALTY CASES.

The leading case upon the question of the rate of interest in admiralty cases in this court is *Hemmenway v. Fisher*, 20 How., 1. In a number of cases the rate of interest has been fixed by the District and Circuit courts at 6 per cent. *The Aleppo*, 7 Ben., 120, Blatchford, J.; *Dyer v. Nat. St. Nav. Co.*, 14 Blatch., 483; *Mary Ecaline*, 14 Blatch., 497. In this last case Mr. Justice Hunt reduced the rate of interest from 7 to 6 per cent.

The rate of interest in the admiralty courts of Michigan has never exceeded 6 per cent., in fact, that is so in both the Sixth and Seventh Circuits.

IV.

AS TO THE COSTS IN THE CIRCUIT COURT OF APPEALS.

The District erred in decreeing that petitioners as the owners of the "New York" pay one half of the costs in the Circuit Court of Appeals.

When the case was removed by appeal from the District Court to the Circuit Court of Appeals, the petitioner was the appellant and *paid all the costs*, as appears from the mandate of that court made a part of the petition in this case as "Exhibit E."

Under the decree entered petitioner is not given credit for what it paid over the one-half of the costs but is compelled to bear all the costs, and pay a further one-half to the libelants. The decree drawn by petitioner gives it credit for these costs, so that the

libelant pays one-half of all the costs, all of which is in accordance with the plain intent of the mandate in this case.

In conclusion we desire to say that the propositions contended for by petitioner are as we believe so plain that it seems unnecessary to discuss them at greater length. It seems to us that the court could issue its writ, or indicate by its opinion in granting leave to file the petition such instructions as cannot be misunderstood by the District Court and in that way dispense with a hearing upon an order to show cause.

The court when the petition is filed is called upon to do over again the work of issuing its mandate because, as we believe, the District Court misunderstood its meaning and intent of the one now issued.

Respectfully submitted,

C. E. Kremer,
H. C. Wisner,
F. C. Harvey,
W. O. Johnson,
Proctors for Petitioners.

Chicago, April, 1900.

No. 12 Orig.

Reply Brf. of Kremer, Wisner & Harvey & Johnson for Petitioner

Filed May 14, 1900.

Office Supreme Court
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MAY 14 1900
Clerk

IN THE

Supreme Court of the United States

NO. 12 ORIGINAL.

OCTOBER TERM, A. D. 1899.

Ex Parte in the matter of the Petition of the Union Steamboat Company, Petitioner.

BRIEF FOR PETITIONER IN REPLY.

C. E. KREMER,
H. C. WISNER,
F. C. HARVEY,
O. W. JOHNSON,
Proctors for Petitioner.

Geo. Hornstein & Co., Printers, Chicago.

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BRIEF FOR PETITIONER IN REPLY.

It is true, as stated by the District Judge, that the decree prepared on behalf of the Union Steamboat Company included interest at seven per cent. per annum, because the court held that this was the rate of interest which was allowed by the courts of the State of Michigan.

Proctors for the Union Steamboat Company, under a misapprehension as to what the Statute of Michigan on the rate of interest was, accepted the construction placed upon it by the proctor for the intervenors, be-

cause they supposed that he was entirely familiar with the interest statutes of his own state.

Subsequently, however, when it was discovered that the legal rate of interest was five instead of seven per cent., the attention of the opposing proctors and of the court was called to this, and a request made to have it changed from seven to five per cent. The court, however, adhered to its finding of a rate of seven per cent.

The District Judge, in Article 8 of his answer refers to Article 4865, Section 6, of the laws of Michigan, as the law which permits the collection of interest at the rate of seven per cent. upon all decrees and judgments, and under this justifies the entering of the decree with interest at seven per cent. We contend that the act of October 3, 1899, repealed the act referred to by the District Judge, and that under this later act decrees draw interest at the rate of five and not seven per cent.

The Pleadings.

The Judge of the District Court answers that the state of the pleadings is such that the decree entered by him is the only one that could be properly entered under the mandate. Until the decision of this court was rendered, there was no occasion to consider any question of pleadings.

The history of the case is this: The final decision of the District Court was, that the "New York" was solely at fault for the collision and therefore liable for *all* the damages. The cross libel was then dismissed. From this decree the the "New York" appealed.

The Court of Appeals reversed the District Court and held the "Conemaugh" solely at fault, dismissed the libel and ordered a decree upon the cross libel.

It is contended that under the form of the decree offered by the Union Steamboat Company, the petitioner would obtain direct affirmative relief against the libelant in the sum of $6,651.28, and that such affirmative relief could not be had or obtained in this case because there are no pleadings on behalf of the Union Steamboat Company asking for it. Is this the fact?

The libelant appears here in the dual capacity of suing for its own damages and as bailee or trustee for damages to the cargo on board of the "Conemaugh."

To this libel an answer was filed by the Union Steamboat Company denying all liability and alleging that the "Conemaugh" was solely at fault for the collision.

After these first pleadings had been filed (page 11 of the record) permission was asked and leave granted by the court to the Union Steamboat Company to file a cross libel against the "Conemaugh" for the damages sustained by the "New York." The cross-libel was filed February 25, 1892 (Rec., p. 11), and is found on pages 12, 13, and 14.

No answer was ever filed to this cross libel. On page 213 of the record, however, is found a stipulation, signed by all the proctors in the case, which finds that the damages sustained by the propeller "New York," by reason of the collision, amount to $3,391.19. This was filed January 25, 1893, at a time

when the District Court had decided that the "New York" was solely at fault for the collision. All steps that might have been taken prior to that time, would have been entirely futile, because of the decision of the District Court, which made the Union Steamboat Company, as owner of the "New York," solely liable for all the damages, so that there would be no occasion to ask for process against the "Conemaugh" for any purpose, either in favor of the "New York" for her damages, or the damages sustained by the "Conemaugh's" cargo.

An appeal was prayed by the Union Steamboat Company from the decree of the District Court, and a trial *de novo* was had in the United States Circuit Court of Appeals.

This court reversed the decree of the District Court and found the "Conemaugh" solely at fault for the collision, dismissed the libel and the intervening petition and the "New York" was found and decreed to be entitled to recover her damages as against the "Conemaugh" by a decree *in personam*.

The signing of the stipulation finding the amount of the damages of the "New York" to be a certain amount, was practically an appearance on behalf of the libelant and placed the Union Steamboat Company in a position to have an affirmative decree entered against the Erie & Western Transportation Company under the cross libel and stipulation.

There was certainly no room for further proceedings in the interest of the Union Steamboat Company after this decision by the Circuit Court of Appeals, as the "New York" was held to be in no way liable for the damages sustained by the "Conemaugh"

or the owners of her cargo. Until the decision in this court there was no need of further pleadings.

We contend here that no further pleadings are necessary in the case because all of the parties are before the court, either as parties libelant or respondent.

The petitioner asks for no affirmative relief, further than to be permitted to recoup whatever it may have to pay beyond a moiety of the damages sustained by the intervenor for the cargo.

The libelant is certainly estopped from saying that so much of the cargo as is represented by it as bailee and trustee cannot recover against it, because it, the libelant, has not been made a party defendant by it, the libelant trustee.

The libelant cannot claim any benefit or advantage by reason of its dual position. It cannot, as libelant, say to itself as libelant bailee, that it will not pay one half of damages sustained by it as bailee of the cargo. It is as much liable as a party *libelant* in this suit as it would be as party *defendant*. It is as much before the court in one case as in the other, as much subject to the process and orders of the court, and we can see no advantage that could be gained by having the libelant also made a defendant in the same suit in which it is already one of the parties.

The objection made here is purely technical. All the equities in the case can be settled here now, as all the parties in interest are before the court.

It can be of no practical interest or benefit to supply further pleadings. All the defenses that have not been made can still be made before the decree is entered.

Upon this question of further pleadings the case of

the "Eleanora," 17 Blatch., 83, cited at length on page 7 of our brief filed with the petition herein, is directly in point.

See, also,

Leonard v. *Whitwill*, 10 Ben., 638.

The "*C. H. Foster*," 1 Fed. Rep., 733, and the cases cited in our brief.

The case of *The* "*Manitoba*," 122 U. S., 97, in many particulars resembles the case at bar.

In that case the owners of the propeller libeled the "Manitaba" for the following damages:

The value of the Comet	$30,000
The value of her cargo	35,000
The value of her freight	5,125

The court held both vessels at fault, divided the damages, and in doing so added together the total damages claimed by the libelant, and to these the damages sustained by the "Manitoba" and then entered a decree in favor of the libelant for one-half of these against the "Manitoba." The amount recovered, however, was less than the amount awarded, because of the limited liability proceedings which had been taken in the interests of the "Manitoba."

It does not appear in that case that any pleadings were filed by the owners of the "Manitoba" against the owners of the "Comet" to recover the damages sustained by the owners of the "Comet's" cargo. We doubt this ever having been done in any case. We certainly have had no such experience, nor have we been able to find any case of the kind in the books.

Libelant furnishes no precedent or authority in point to sustain the position that the court cannot now under

the present state of the pleadings grant the relief asked and do full and perfect justice to all the parties in interest.

In the case at bar, the decree ("Exhibit C") provides for the payment of all the damages of the intervenors, namely $19,841.56, by the Union Steamboat Company, and for a further recovery by the libelant from the Union Steamboat Company of the sum of $12,976.38, which, together, amounts to the sum of $32,817.94, one-half of the total damages sustained in this case. This leaves the libelant to account to the owners of the cargo represented by it as trustee either for the whole or a part of the damages, if by any private arrangement or contract its liability was lessened.

The case of *The "Juniata,"* 93 U. S., 337, cited by the Judge of the District Court as supporting the decree entered in this case, is not in point, because in that case, the United States as owner of a certain scow filed *a separate* libel against the "Juniata" alone, *to which libel the original libelant was in no way made a party;* therefore, the court could not, in the case of the *United States* v. *The "Juniata"* enter a decree against Pursglove, who was the libelant in the original collision case suing for the loss of the steam tug "Neafie." He had not been made party to the case of the United States in any way, and no decree could therefore be entered against him, until under rule 59, or a similar rule, he had been made party at the request of the "Juniata."

This case would be in point if the owners of the cargo had filed an original libel against the "New York" alone.

Here the owners of the cargo are not in court as libelants but are represented by the owner of the "Conemaugh." The owner of the "Conemaugh," as libelant, after the court finds that the libelant and claimant are jointly liable each for a moiety of the damages, will be estopped from saying that this amount can not be recovered of it, because it, the libelant, was not made a party defendant by the owners of the cargo.

In other words, the libelant cannot defeat the claim of *libelant as trustee* because as such trustee it did not make the libelant a party defendant. Neither can the libelant defeat the claim of the claimants for contribution because the latter did not make the libelant a party defendant.

The object of a pleading is to raise an issue. In a case of this kind after the court had found both vessels at fault, all issues were determined and no new issues could be raised by any further pleadings that could be filed. The right of contribution existed of course, and could be enforced under the pleadings then in the case. Pleadings could serve no useful purpose, and would therefore be only an unnecessary incumbrance on the record.

The defense under the contract or bill of lading is one that must come from the libelant. When the intervenors filed their petitions it was proper for the libelant to answer these. if it had any defenses to offer. The Union Steamboat Company filed its answers to these petitions, denying all liability for the collison or any damage arising out of it.

Courts of admiralty have always favored the directest course and simplest methods in arriving at the dis-

tribution and contribution of damages in collision cases.

It has been held in this country in the case of *Ebert* v. *Schr.* "*Reuben Doud*," 3 Fed. Rep., 520, following the case of *The* "*Sapphire*," 18 Wal., 51, that a cross libel is not strictly necessary, but if it appear from the answer that the vessel libeled has sustained damages, the amount of these damages can be recouped without the filing of a cross libel.

Courts of admiralty in England have been equally liberal in this respect. *The* "*Seringapatim*," 3 Wm. Rob., 38.

In this case the cross action had been abandoned and after the court had held both vessels at fault, Dr. Lushington in his opinion says:

"Taking all the circumstances of the case into my consideration, the course which I shall adopt is this: I shall not depart from my original decree, but shall confine the reference to the registrar and merchants to the amount of the compensation to which the owners of the 'Harriet' are entitled. At the same time, I shall not permit the full amount of that compensation to be paid to them, unless they submit to the deduction of a moiety of the damages sustained by the owners of the 'Seringapatim.'"

With all the parties before the court we claim that no further or other pleadings are necessary.

The Rule as to Damages When Two Vessels are at Fault.

It is now well settled that in cases of mutual fault, the practice of cross decrees that prevails in chancery does not obtain in the courts of admiralty either in this country or in England.

In fact the principle of cross decrees is opposed to the rule which the Supreme Court adopted in the cases of *The North Star* and *Chatahoochee.*

This question, cross decrees, was discussed at length in the House of Lords in the case of *Stormvaart M. N.* v. *Peninsular & O. S. N. Co.*, 7 App. Cas., 795, wherein it was held that the owner of the "Khedive" was not entitled to the benefit of the Act of Parliament limiting the liability of vessel owners, because the rule of the division of damages in admiralty was firmly settled that in all cases of mutual fault the party sustaining the greater damages was entitled to a decree for a moiety of his damages less a moiety of the damages of the other vessel, and expressly deciding that the rule of cross decrees did not apply, and one decree only was necessary.

If by the clause of the bill of lading, the intervenors are unable to collect any part of the damage of the "Conemaugh," then so much of the damage as the "Conemaugh" would be liable for becomes released, but this release of the "Conemaugh" can not operate to increase the burden or the liability of the "New York." This would be contrary to justice and to the rule laid down in *North Star* and *Chattahoochee* cases.

If either of the parties must suffer under these cir-

cumstances, it ought to be the party that has voluntarily released its claim against one of the wrongdoers, and not the other wrongdoer, who, but for the clause, would pay but one-half of the damages.

This increase of liability was not contemplated. It was not intended. It can not bind the "New York."

It is also contended by the libelant that it became the duty of the "New York" to bring in the "Conemaugh" or her owners under rule 59 as a party defendant in order to recover against her in this case.

A careful reading of rule 59 will show conclusively that it never was intended to cover any such case as we have here. The rule provides as follows:

"In a suit for damage by collision, the claimant of any vessel proceeded against, or any respondent proceeded against *in personam*, shall, by petition on oath, presented before or *at the time of answering the libel*, or within such further time as the court may allow, and containing suitable allegations, *showing fault or negligence in any other vessel contributing to the same collision, and the particulars thereof, and that such other vessel or any other party ought to be proceeded against in the same suit for such damage*, pray that process be issued against such vessel or party to that end, such process may be issued, and if duly served such suit shall proceed as if such vessel or party had been originally proceeded against; the other parties in the suit shal answer the petition; the claimant of such vessel or such new party shall answer the libel and such further proceedings shall be had and decree rendered by the court in the suit as to law and justice shall appertain."

It is perfectly apparent that this rule was intended to enable one defendant to bring in a third party as an additional defendant, and had nothing whatever to

do with making a party a defendant when that party was already in court as a party libelant.

The case of *The* "*Beaconsfield*," 158 U. S., 303, is also relied on as an authority in this case as showing that rule 59 applies. We contend that that case has no application whatever, for in that case the master of the "Beaconsfield" filed a libel against the "Britannia" *alone* for damages to the "Beaconsfield's" cargo. The "Beaconsfield" was not joined as a party defendant, and in order to bring her into court, the owners of the "Britannia" filed a petition under rule 59. The "Beaconsfield" not being a party to the suit, the "Britannia" was compelled to resort to this method of making her a party.

In that case the master and owner of the "Beaconsfield" representing her cargo in the suit brought against the "Britannia" recovered a decree for but half of the damages of the cargo against the "Britannia" and a decree for the other half against the "Beaconsfield," their own ship.

Applying the rule in this case to the case at bar, the libelant cannot recover on account of the cargo of the "Conemaugh," a decree for more than one-half of the amount of the cargo damage and must bear the other half itself, and this can be carried out as readily in this proceeding by the court as it was done in the "Beaconsfield" case.

The decree can provide as in that the libelant pay damages to the owners of the cargo represented by it.

The rule in admiralty in case of a division of damages is well settled by the decision of this court and also by the House of Lords in England. See:

North Star, 106 U. S., 17.

Manitoba, 122 U. S., 97.

Stormvaart M. M. v. *Peninsular & O. S. N. Co.*, 7 App. Cas., 795.

Albert Dumois, decided April 9, 1900, by this court and not yet reported.

In all of these cases, the rule is stated to be, that in cases where the collision occurred through the mutual fault of two vessels the damage done to both vessels should be added together in one sum, and equally divided, and a decree pronounced in favor of the vessel which suffered most against the vessel which suffered least for one half the difference between the amounts of their respective losses.

This has been done even when under the Limited Liability Act of 1851 the claimants could not have recovered if they had brought suit against the owners of the sunken vessel, and in the case of *The "Chattahoochee,"* 173 U. S., 549, in which the owners of the cargo of the steamer lost could not have recovered from the lost steamer because of the Act of Congress of February 13, 1893, known as the "Harter Act."

These decisions are again affirmed in the case of *The "Dumois."*

In the case at bar the libelant contends that the owners of the cargo are not entitled to recover because of the clause in the bill of lading (Rec., 270), which gave to the owner of the "Conemaugh" the benefit of any insurance, however effected, covering the cargo, and that under this clause in the bill of lading, there was no liability for any part of the cargo damages, at least so far as they are represented by the intervenors, the insurance companies, and that the cargo insurers have no claim against the "Conemaugh," and that there-

fore the owners of the "New York" can not recoup any part of the damages that they may have paid to the intervenors of the cargo in this case.

We contend as against that, that the rights of the libelant are no higher under this bill of lading than they would have been under the act of Congress of 1893, and that this exemption which might defeat a direct action against the libelant can not be utilized to reduce its liability in a case of this kind, any more than the act of 1851 and the act of 1893 did in the cases of *The* "*North Star*" and *The* "*Chatahoochee*," respectively.

In the case of *The* "*Chatahoochee*" as cited by this court in the case of *The* "*Dumois*," the court said, referring to the case of *The* "*Chatahoochee*":

"We held in that case that the sunken vessel was not entitled to the benefit of any statute tending to lessen its liability to the other vessel, or to an increase of the burden of such other vessel, until the amount of such liability had been fixed upon the principle of an equal division of damages."

We believe that under this bill of lading the rules should be the same as in the case of *The* "*North Star*" and *The* "*Chatahoochee*," as it is based upon the same principle.

The Clause in the Conemaugh's Bill of Lading, the Effect of Which is to Release Her From Any Claim of Her Cargo.

On page 270 of the record, in the "Conemaugh's" bill of lading, there appears the following clause:

"And the person or party liable, or who might sustain loss in consequence of owning or chartering or being interested in or as to such vessel, shall have any insurance, however effected, on, as to, or covering the property lost or damaged, and all benefit and advantage to be derived therefrom."

A similar clause to this was held to operate as a release of the carrier from all liability, when the insurance obtained by the shipper has been collected by him.

E. & W. Trans. Co. v. *Phœnix Ins. Co.*, 117 U. S., 312.

Inman v. *S. C. Ry. Co.*, 129 U. S., 128.

This clause in the bill of lading, if invoked in this case for the purpose of releasing the "Conemaugh" at the expense of the "New York," or for any purpose, if valid, operates to defeat all right of action on the part of the cargo owner against either of the vessels in this case.

The moment that the shipper of the "Conemaugh's" cargo sustained damages, he had a right of action for them. In the light of the decisions of this court, this right of action existed against the "New York" and the "Conemaugh" jointly and severally.

The clause in the bill of lading had no vitality until called into life by the collision, then it became operative, because of the existence of a claim for damages for

which the vessel might be held liable, it remained suspended even then until the insurance was actually collected. This done it released the owners of the "Conemaugh" from any and all liability. By doing so we contend it not alone released her, but also released the "New York" under the familiar rule of law that the release of one joint *tort feasor* releases all.

This has been held to be the rule at common law where the right of action was joint and several, as in this case.

Even when the release purports to release but one, and is not intended to release the other *tort feasors*, it operates to do so, notwithstanding.

In the case of *Lovejoy* v. *Murray*, 3 Wal., 1, the court on page 19 says:

"But when the plaintiff has accepted satisfaction in full for the injury done him, from whatever source it may come, he is so far affected in equity and good conscience that the law will not permit him to recover again the same damages. But it is not easy to see how he is so affected until he has received full satisfaction, or that which the law must consider such.

We are, therefore, of opinion that nothing short of satisfaction, or its equivalent, can make good a plea of former judgment and trespass offered as a bar in an action against another joint trespasser who was not a party to the first judgment."

In the case of *Chapin* v. *C. & E. I. R. R. Co.*, 18 Ill. App., 47, there was a collision between two railroad trains. One of the railroad companies made a settlement with the injured party and was released by the terms of the settlement. The court held in that case that this released the other railroad company, which was jointly and severally liable with the one released.

In the case of *Barret* v. *Third Ave. R. R. Co.*, 45 N. Y., on page 635, the court lays down this rule:

"The rule is, that a party receiving an injury from the wrongful acts of others, is entitled to but one satisfaction, and that an accord and satisfaction by, or a release or other discharge by the voluntary act of the party injured, on one, of two or more joint *tort feasors*, is a discharge of all. (*Knickerbocker* v. *Colver and Hawes*, 8 Cow., Ill.; *Livingston* v. *Bishop*, 1 J. R., 290; *Ruble* v. *Turner*, 2 Hen. & Munf., 38; *Bronson* v. *Fitzhugh*, 1 Hill, 185.)"

See also:

Woods v. *Pangburn*, 75 N. Y., 495.

Bronson v. *Fitzhugh*, 1 Hill, 185.

Senthu v. *Phil. Traction Co.*, 125 Pa. St., 497.

Long v. *Long*, 57 Iowa, 497.

Tomkins v. *Clay St. H. R. R. Co.*, 66 Cal., 163.

Brown v. *City of Cambridge*, 3 Allen, 474.

Liddy v. *Barney*, N. E. Rep., Vol. 2, No. 1, page 107.

Goss v. *Ellison*, 136 Mass., 503.

20 Am. & Eng. Encyc., 765, and cases there cited.

If the clause operates as a release of the owners of the "Conemaugh," it also and in the same way releases the owners of the "New York," at least from the claim represented by the intervenors, for they bring themselves, as insurers of the cargo, directly within the clause of the bill of lading as construed by this court in *E. & W. Tr. Co.* v. *Phœnix Ins. Co.*

Whether the bill of lading releases the "Conemaugh" or not, the "New York" ought in no case

to be made to pay more than one-half of the damages arising out of this collision.

Should the court hold that further pleadings are necessary to properly do this we pray now for leave to file such additional pleadings or, to amend such as are now filed in the case, as may be necessary.

We therefore respectfully maintain that a writ of mandamus, or some other direction be given, setting aside the decree entered in this case by the District Court and directing by mandate such further proceedings as shall be in accordance with law and practice and the opinion of this court.

Respectfully submitted.

C. E. KREMER,
H. C. WISNER,
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Proctors for Petitioners.

May, 1900.

No. 12 Orig.
Brf. of Canfield for Intervening Underwriters

Office Supreme Court
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 12, Original.

EX PARTE, IN THE MATTER OF THE UNION STEAMBOAT COMPANY, PETITIONER.

Brief for intervening Underwriter on the CONEMAUGH'S cargo in support of the answer of the Judge of the District Court for the Eastern District of Michigan to the order to show cause why a writ of mandamus should not be issued.

F. H. CANFIELD,
Counsel for Intervening Underwriters.

DETROIT:
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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 12, Original.

EX PARTE. IN THE MATTER OF THE PETITION OF THE UNION STEAMBOAT COMPANY, PETITIONER.

Brief for the Underwriters on the cargo of the Propeller "Conemaugh".

When the principal case of the Erie & Western Transportation Company, owner of the propeller Conemaugh, and intervening underwriters on her cargo vs. the Union Steamboat Company, claimant, was argued before this Court, it was insisted in behalf of the underwriters that if the New York was in fault for the collision, she is liable to said underwriters for the full amount of their damages, although the Conemaugh was also in fault, the established rule being that the owner or underwriter on cargo, in cases of collision brought about by the mutual fault of two vessels, has the right to sue either or both of the wrongdoers, and to recover full satisfaction from either or both.

The Alabama and the Gamecock, 92 U. S., 695.
The Virginia Ehrman, 97 U. S., 309-317.
The Atlas, 93 U. S., 312.
The Beaconsfield, 158 U. S., 303.
The Juniata, 93 U. S., 337.

This contention on the part of the underwriters was fully sustained by the Court. In its opinion, delivered by, Mr. Justice Brown, the Court said:

"The final question arises upon the insistence of the "underwriters of the Conemaugh's cargo, that they are "entitled to a recovery to the full amount of their dam- "ages against the New York, notwithstanding the Cone- "maugh may also be in fault for the collision. They are "correct in this contention. Indeed, this Court has al- "ready so decided in the case of *The Atlas*, 93 U. S., 302, "315, 317. This was a libel against the Atlas by an insurer "of the cargo of a canal boat in tow of the steam tug Kate, "whereby the canal boat and her cargo were lost. It was "insisted by the claimant that, as the libelant had failed "to make the Kate a party, and as both vessels were found "to be in fault for the collision, there could be a recovery "of only a moiety of the damages. The case of *The Milan*, "Lush., 388, was confidently relied upon as an authority. "This court, however, was of opinion that a plaintiff, who "has suffered a loss by the negligence of two parties, was "at liberty, both at common law and in admiralty, to sue "both wrongdoers or either one of them at his election, "and 'it is equally clear, that, if he did not contribute to "the disaster, he is entitled to judgment in either case for "the full amount of his loss. He may proceed against all "the wrongdoers jointly, or he may sue them all or any "one of them separately. * * * Co-wrongdoers, not "parties to the suit, cannot be decreed to pay any portion "of the damage adjudged to the libelant, nor is it a ques- "tion in this case whether the party served may have pro- "cess to compel the other wrongdoers to appear and re- "spond to the alleged wrongful act.' A like ruling was "made in *The Juniata*, 93 U. S., 337, in which a libel was "filed by the United States as owner of the cargo of a flat- "boat in tow of one of two vessels."

"The decree of the Court of Appeals is therefore re- "versed and the case remanded to the District Court for "the Eastern District of Michigan for further proceedings "in consonance with this opinion."

175 U. S., 187.

The right of the underwriters to recover the full amount of their damages from the New York is not questioned. It was fully conceded by the proctors for the petitioner, and such payment is provided for in the decree which they presented to the District Court and asked to have entered.

The decree which has been entered by the District Court under the mandate awards to the cargo underwriters the full amount of their damages against the New York, and is, therefore, so far as it affects them, strictly in accordance with the mandate, and in consonance with the opinion, of this Court. This application for a mandamus to change the decree cannot affect their rights, except in respect to the rate of interest which the decree should bear; and this brief is therefore confined to that question.

This court, by its mandate, directed the District Court to enter a decree in consonance with the opinion of this Court, "*with interest from July* 3, 1896, *until paid, at the* "*same rate per annum that decrees bear in the courts of the* "*State of Michigan.*"

The statute of the State by which the rate of interest is prescribed is to be found in Chapter 122, 2 Compiled Laws of Michigan of 1897, page 1533, which is as follows:

"CHAPTER 122.—MONEY OF ACCOUNT AND INTEREST."

"OF—MONEY OF ACCOUNT, AND OF THE INTEREST ON MONEY, AND ON JUDGMENTS, VERDICTS, ETC."

"(4854) Section 1. The money of account of this State, shall be the dollar, cent, and mill; and all accounts in the public offices, and all other public accounts, and all proceedings in courts, shall be kept and had in conformity with this regulation."

"(4855) Sec. 2. Nothing contained in the preceding section shall vitiate or affect any account, charge or en-

ury, originally made, or any note, bond, or other instrument expressed in any other money of account; but the same shall be reduced to dollars and parts of a dollar, as hereinbefore directed, in any suit thereupon."

"AN ACT to regulate the interest of money on account, interest on money judgments, verdicts, etc."

"(4856) Sec. 1. *The People of the State of Michigan enact*, that the interest of money shall be at the rate of six dollars upon one hundred dollars for a year, and at the same rate for greater or less sum, and for a longer or shorter time, except that in all cases, it shall be lawful for the parties to stipulate in writing, for the payment of any rate of interest not exceeding eight per cent per annum: Provided, That this act shall not apply to existing contracts whether the same be either due, not due, or part due."

"(4857) Sec. 2. No bond, bill, note, contract or assurance, made or given for or upon a consideration or contract, whereby or whereon a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, shall be thereby rendered void; but in any action brought by any person on such usurious contract or assurance, except as is provided in the following section, if it shall appear that a greater rate of interest has been, directly or indirectly, reserved, taken or received, than is allowed by law, the defendant shall not be compelled to pay any interest thereon."

"(4858) Sec. 3. Whenever it shall satisfactorily appear by the admission of the defendant, or by proof that any bond, bill, note, assurance, pledge, conveyance, contract, security, or any evidence of debt has been taken or received in violation of this act, the court shall declare the interest thereon to be void."

Sec. 4 repeals "all acts or parts of acts contravening the provisions of this act."

(4859) Sec. 1 provides for interest on installments of interest, due and unpaid.

(4860) Sec. 1 relates to interest on notes, etc., payable out of the State.

(4861) Sec. 2 relates to the same subject.

(4862) Sec. 3 provides that parties loaning money may take interest authorized by the State, without reference to law of place where payable.

(4863) Sec. 4 provides that interest on loans, payable in any other State, shall not be affected by the laws thereof.

(4864) Sec. 5 provides that negotiable notes shall not be affected by usurious interest.

"INTEREST ON JUDGMENTS, VERDICTS, ETC."

(4865) Sec. 6. "Interest may be allowed and received upon all judgments at law, for the recovery of any sums of money, and upon all decrees in chancery for the payment of any sums of money, whatever may be the form or cause of action or suit in which such judgment or decree shall be rendered or made; and such interest may be collected on execution, at the rate of seven per centum per annum: Provided, That on a judgment rendered on any written instrument, having a different rate, the interest shall be computed at the rate specified in such instrument, not exceeding ten per centum."

(4866) Sec. 7. "In all actions founded on contracts express or implied, whenever in the execution thereof any amount in money shall be liquidated or ascertained in favor of either party, by verdict, report of referees, award of arbitrators, or by assessment made by the clerk of the court or by any other mode of assessment according to law, it shall be lawful unless such verdict, report, award or assessment shall be set aside, to allow and receive interest upon such amount so ascertained or liquidated, until payment thereof, or until judgment shall be thereupon rendered; and in making up and recording such judgment, the interest on such amount shall be added thereto, and included in the judgment."

Section 4865, above quoted (being Sec. 1587 of Howell's Ann. Stats.), is the only section which in terms provides for interest on judgments and decrees. It has been em-

bodied in, and has formed a part of the laws of the State as a distinct and independent section in substantially the same form from 1838 to the present time. It appears in the Revised Statutes of 1846, and in the various compilations of the laws of the State "*in force*," made under legislative authority, in 1857, 1871, 1882, and finally in the compilation of 1897. The question is now raised for the first time by the counsel for the petitioner in this case whether said section was repealed or amended by the Act of 1891, which is itself embodied in and forms a part of Chapter 122 of the Laws of 1897.

I insist that section 4865 remains *in force*, not affected by the Act of 1891 or the amendment thereto of 1899, and that by virtue of its provisions the rate of interest which judgments and decrees of the courts of the State of Michigan bear is seven per cent per annum. This conclusion follows from the decisions of the Supreme Court of the State, as well as from the *practical* construction which the statute has received.

First. The Supreme Court of Michigan, in *Hayden vs. Heffernan*, 99 *Mich.*, 262, decided in 1894, three years after the Act of 1891 was adopted, recognizes this section of the Compiled Laws relating to interest on judgments and decrees as being still in force. That case involved the question whether a judgment for costs in favor of an appellant in an appeal from the Probate Court would bear interest. The Court said: "A judgment for costs is as much a judg-"ment as any other, and is, therefore, within the terms of "the statute. * * * Interest upon claims allowed "against the estates of deceased persons may be claimed "under Section 1597, How. Stat. [Sec. 4865, Comp. L. "1897], which is broad enough to cover the present case."

University Regents vs. Auditor-General, 109 Mich., 134.

Second. The *practical construction* which has been given to the statutes of Michigan relating to interest since the Act of 1891 was adopted shows that Sec. 1597, How. Stat., is still in force and not affected by the Act of 1891. It is made the duty of the Secretary of State of Michigan to publish the statutes adopted by the legislature at each session, and to include in the published volume a list of the sections and chapters of the annotated statutes which were amended or repealed. Such lists appear in each volume of the statutes, and in the index to the Acts of 1891, page 443. Sections 1595 to 1596, inclusive, are mentioned as being repealed by the Act of 1891, to which we have referred.

Sec. 1597, How. Stat., as already shown, is included in the compilation of the statutes of Michigan of 1897, and it there appears as Section 4865.

The compilation of 1897 was made pursuant to an Act of the Legislature, approved June 4, 1895.

See Public Acts of Mich., p. 579.

Section 1, of which provides: "That all the general laws *in force* in this State, and all general acts and parts of acts passed by the present legislature which shall be approved and become laws shall be collected and compiled without alteration under their appropriate heads and titles," etc.

The statute provides for the appointment of two commissioners to examine and certify that the statutes as compiled are a correct compilation of all general laws *in force*.

See Commissioners' Certificate and Preface, Vol. 1. Compl. Laws of 1897.

These commissioners, clearly, did not think that the Act of 1891 in any manner affected the previous statutes relating to interest on judgments and decrees.

In view of the fact that said Sec. 1597, relating to interest on judgment and decrees, is included in the compilation of 1897, and that said compilation has been approved and

certified to by the commissioners as containing the general laws of the State *in force;* that it has been approved by the legislature itself; and that it has been accepted by the courts of Michigan, as well as all branches of the State government, as being a correct compilation of the laws *in force*, we submit that this court will not hesitate to conclude that Sec. 4865, 2 Compl. Laws of 1897 (being Sec. 1597, How. Stat.), remains *in force*, and that the court below properly entered a decree in this case for interest at the rate of seven per cent per annum.

a. The Act of 1891 relates only to interest on *contracts*, and not to interest on judgments and decrees.

By Section 1 it provides that the interest of money shall be at the rate of six per cent, except that in all cases it shall be lawful for the parties to stipulate in writing for the payment of any rate of interest not exceeding eight per cent per annum, with the proviso that the Act shall not apply to existing contracts.

Sec. 2 provides that the taking of usury shall not render the contract void.

Sec. 3 makes it the duty of Court, if it shall appear that any contract has been taken in violation of the Act, to declare the interest thereon void.

Sec. 4 repeals all Acts or parts of Acts *contravening* the provisions of this Act.

The Act contains nothing which does not aptly relate to interest on contracts. It is true that interest on judgments and verdicts are mentioned in the title of the Act; but nowhere else. The title cannot extend the effect of the Act beyond the scope of the text or body of the Act itself.

The Legislature of the State knew that by the common law, judgments and decrees do not bear interest. It was, therefore, careful to provide expressly, by a special section of the statute, that judgments in the courts of Michigan

should bear interest at a specified rate. This was done, as I have shown, as early as 1838. And this *special* section has been retained in substantially the same identical form *and under a special heading or title*, through every revision and every compilation of the statutes of the State since 1838, including the revision of 1846 and the compilations of 1857, 1871 and 1882, as well as the compilation of 1897, which was made six years after the Act of 1891 was adopted.

It will be observed that section 1 of the Act of 1891 is substantially the same as section 3 of Chapter 6 of the Revised Statutes of 1838, and Section 3 of Chapter 34 of the Revised Statutes of 1846, which is preserved in the subsequent compilations of 1857, 1871 and 1882, except as to the *rate* of interest.

Now, if Section 1 of the Act of 1891 is sufficient to include judgments and decrees, why was it not discovered that Section 3 of the law, as it had previously existed, also included judgments and decrees? Why was the Legislature careful to preserve for more than sixty years a separate section which *expressly* provides for interest on judgments and decrees, if such an express provision was not regarded as necessary? The very fact that the section expressly relating to interest on judgments and decrees was originally enacted, and that it was re-enacted in the subsequent revision, and that it has been preserved in the several compilations which have since been made, shows that the Legislature did not intend that the Act of 1891 should relate to judgments and decrees.

b. It cannot be claimed that the Act of 1891 affects interest on "judgments, verdicts and decrees" simply because those words are included in its title.

1. As already stated, the title of the Act cannot extend its effect or meaning beyond the scope of the text or body of the Act itself.

2. The title of the Act of 1891 is substantially identical with the title of the previous statutes on the subject of interest. If, in the statute of 1838, which has substantially the same title as the Act of 1891, the Legislature thought it necessary to provide for interest on judgments and decrees by a special section, why did not the Legislature make a similar express provision in the Act of 1891, if *that* Act was intended to relate, in any manner, to judgments and decrees? In other words, if the Legislature intended that the Act of 1891 should relate to judgments and decrees, why did it not say so in the body of the Act?

Further argument is unnecessary, but a review of the legislation of the State will show that the Legislature has *always* carefully preserved the section relating to interest on judgments and decrees (4965, Comp. L. 1897, 1597 Howell's Ann. Stats.), and that that section remains *in force;* and that judgments and decrees in the courts of Michigan still bear interest at the rate of seven per cent per annum.

a. It cannot be contended that the Legislature intended to *repeal* the sections of the former statute allowing interest on judgments, verdicts and decrees. The repealing clause of the Act of 1891 repeals only such acts and parts of acts which *contravene* the provisions of that act Sec. 4865, Compl. Laws of 1897, *does not* contravene the provisions of the Act of 1891. The former relates to interest on judgments and decrees, while the latter relates to interest on contracts.

Repeals by implication are not favored, the rule being that there must be a positive repugnancy between the provisions of the new law and those of the old to work a repeal by implication.

Wood vs. U. S., 16 Peters, 342.
Chew Heong vs. U. S., 112 U. S., 549.
Ross vs. Wenie, 157 U. S., 46.

In *Rosencrans vs. U. S.*, 165 *U. S.*, 257-262, it is said:

"Where Congress has expressly legislated in respect to a given matter, that express legislation must control in the absence of subsequent legislation equally express, and is not overthrown by any mere inferences or implications to be found in such subsequent legislation."

This is peculiarly applicable to the present case. The Legislature has *expressly legislated* in respect to interest on judgments and decrees; and the subsequent legislation does not, in express terms, refer to *such* interest. Therefore, the former legislation cannot be considered as having been repealed.

This rule of construction has been followed by the Supreme Court of Michigan in many cases.

In *People vs. Hanrahan*, 75 *Mich.*, 622, it is said:

"Repeal by implication is never permitted if it can be avoided by any reasonable construction of the statutes. If both acts can be given full force without conflicting with each other, or if the latter act is merely affirmative, or auxiliary, and not inconsistent, both must stand, and the former is not repealed."

Gordon vs. People, 44 Mich., 485.
Canal & Railway Co. vs. Attorney-General, 79 Mich., 353.
Black on Interpretation of Statutes, 112.

And see particularly *University Regents vs. Auditor-General*, 109 *Mich.*, 134, which involved the construction of the statutes relating to interest.

c. The Act of 1891 did not *amend* section of the former statute referred to, relating to interest on judgments and decrees.

It does not expressly amend those sections, and under Sec. 25, Article IV., of the Constitution of Michigan, there can be no such thing as an amendment of a former law by implication.

That section declares:

"No law shall be revised, altered or amended by reference to its title only; but the act revised and the section or sections of the act altered or amended shall be re-enacted and published at length."

See 1 Compl. Laws of Mich., of 1897, p. 83.

Therefore, to hold that the Act of 1891 was intended to amend sections of former law relating to interest on judgments and decrees, will render the act unconstitutional.

There are various special sections of the Compiled Laws of Michigan relating to interest, which are distinct from the general provisions as to interest upon contracts. Thus, in addition to the special section relating to interest on judgments and decrees, there is Section 1195 (Howell's, 5361), which provides for interest on the educational funds of the State; also Section 1196 (Howell's, 5360), providing for interest on the University fund, and that the rate shall be seven per cent; and which the Supreme Court, in *University Regents vs. Auditor-General*, 109 *Mich.*, 134, has expressly decided, has not been affected by the Act of 1891. There is also Section 10470 (Howell's, 8139), respecting interest on judgments rendered against incorporated banks, which provides that the plaintiff in such judgments shall recover "*ten* per cent a year, instead of the rate established by law;" and Section 3912, which provides that money due for delinquent taxes shall, after a certain date, bear interest at the rate of eight per cent. All of these statutes existed long prior to 1891. No one will contend that any of them were either amended or repealed by the Act of 1891. None of them *contravene* the Act of 1891. The same is true of the section relating to interest on judgments and decrees.

Although there is no necessity for further argument on the part of the cargo underwriters, I beg to suggest that

the decree entered by the District Judge is the only decree which could be properly entered, if the mandate and the opinion of this Court is considered in the light of well established rules of practice in admiralty cases.

1. This Court has decided that the New York, being found in fault, must pay to the cargo underwriters the full amount of their damages. What the petitioner asks is, to be allowed to recoup from the Conemaugh, one-half of what it may have to pay to these underwriters. That such a decree would be an affirmative decree clearly appears from an examination of the figures showing the damages to the respective parties to the suit, viz.:

Erie & Western Transportation Co., as owners of the Conemaugh		$30,508.46
Erie & Western Trans. Co., as trustee for underwriters other than intervenors		19,627.67
Underwriters who have intervened, viz.:		
British & Foreign Marine Ins. Co., Ltd.	$2,421.84	
Ins. Co. of North America	7,950.09	
Union Marine Ins. Co.	8,553.06	
Marine Ins. Co., Limited	916.57	
		$19,841.56
Union Steamboat Co., for damage to New York		$4,341.80

Now, if the damages to the two steamers are divided, the Erie & Western Transportation Co. would recover one-half of the damages to the Conemaugh, to-wit: $15,254.23, less one-half the damage to the New York, to-wit: $2,170.90, or $13,083.33; but if the petitioner is permitted to recoup half of what it is liable to pay the cargo underwriters, to-wit: $19,734.61, in addition to half of the damage to the New York, it will result in an affirmative decree in its favor against the Erie & Western Transportation Co. for $6,651.28, besides interest. Of course it cannot ask for such a recoupment until it has paid the cargo loss. But surely

the mandate of this Court does not direct the entry of such a decree, nor would such a decree be in accordance with the rules of admiralty practice.

(a) A respondent or claimant cannot have affirmative relief unless he asks for it under a cross libel. An answer cannot be made to serve the purposes of a cross libel, even if the parties expressly so stipulate. This was decided in *Ward vs. Chamberlain*, 21 How., 572, where it was held that the respondent in the original suit, if he wishes to obtain the benefit of a cross libel, should file one and take out process and serve it in the usual way.

In this case no process was taken out under the cross libel, nor was it waived by appearance, or otherwise, on the part of the Conemaugh's owner. It, therefore, never became a valid, living pleading. The whole history of the case, from the day it was filed, shows it was treated as abandoned.

(b) Courts of admiralty administer relief, *secundum allegata et probata*. Relief cannot be decreed in the absence of a proper pleading, any more than it can be decreed in the absence of the necessary proof. Both pleading and proof are necessary, and these must correspond.

The necessity of a cross libel, in order to enable the respondent to obtain affirmative relief, is recognized in *The Saphire*, 18 Wallace, 51, and by implication at least, in *The Atlas*, 93 U. S., 302. And such is the practice in the District Courts:

The Reuben Doud, 3 Fed., 520.
The Ping-On, 11 Fed., 607.
Gillingham vs. Tow Boat Co., 40 Fed., 651.

In this respect the admiralty practice is like the practice in equity; where the defendant must file a cross bill, in order to obtain affirmative relief.

Transportation Co. vs. Coal Co., 42 Fed., 920.

If the respondent does not file a cross libel, he must institute another independent suit, if he wishes to recoup or recover damages against the original libelant.

The Juniatta, 93 U. S., 337.

(c) Even if the cross libel in this case can be regarded as effectual for any purpose, it lays no foundation for a decree of recoupment *in personam* against the owner of the Conemaugh, for the reason that the cross libel is *in rem* against the vessel alone. A decree *in personam* cannot be had against the owner of a vessel under a libel *in rem*, nor can the owner be joined as a respondent in a suit for collision against the vessel. *The Corsair*, 145 U. S., 335. This is true, whether the libel is a cross libel or an original libel.

(d) But if these objections can be overlooked, there is another which is fatal to *any* claim which can be made under the cross libel, and that is the fact that it was dismissed by order of the District Court, on the 16th day of May, 1895 (see printed Record in this Court, page 198), and no appeal was taken from that order, which therefore, under the familiar case of *The Dove*, 91 U. S., 381, became *res judicata* of any claim which the New York might have against the Conemaugh, growing out of this collision.

The fact that the owner of the Conemaugh was before the Court as libelant does not afford any ground for a decree against such owner, in favor of the petitioner. This necessarily follows from the decision in the case of *The Juniatta*, above cited.

It appears that the petitioner took no proceeding against the owner of the Conemaugh, to compel it to respond for any claim for damages under General Admiralty Rule 59. Had it done so, then under the case of the *Beaconsfield*, 158 U. S., 303, a different question might be presented. No such petition having been filed, under the decision in the

Beaconsfield, there is no suit against the owner of the Conemaugh, upon which a decree can be rendered.

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Counsel for Underwriters.

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Brf. of Goulder & Masten for Resp.

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 12, Original, October Term, 1899.

Ex Parte in the Matter of

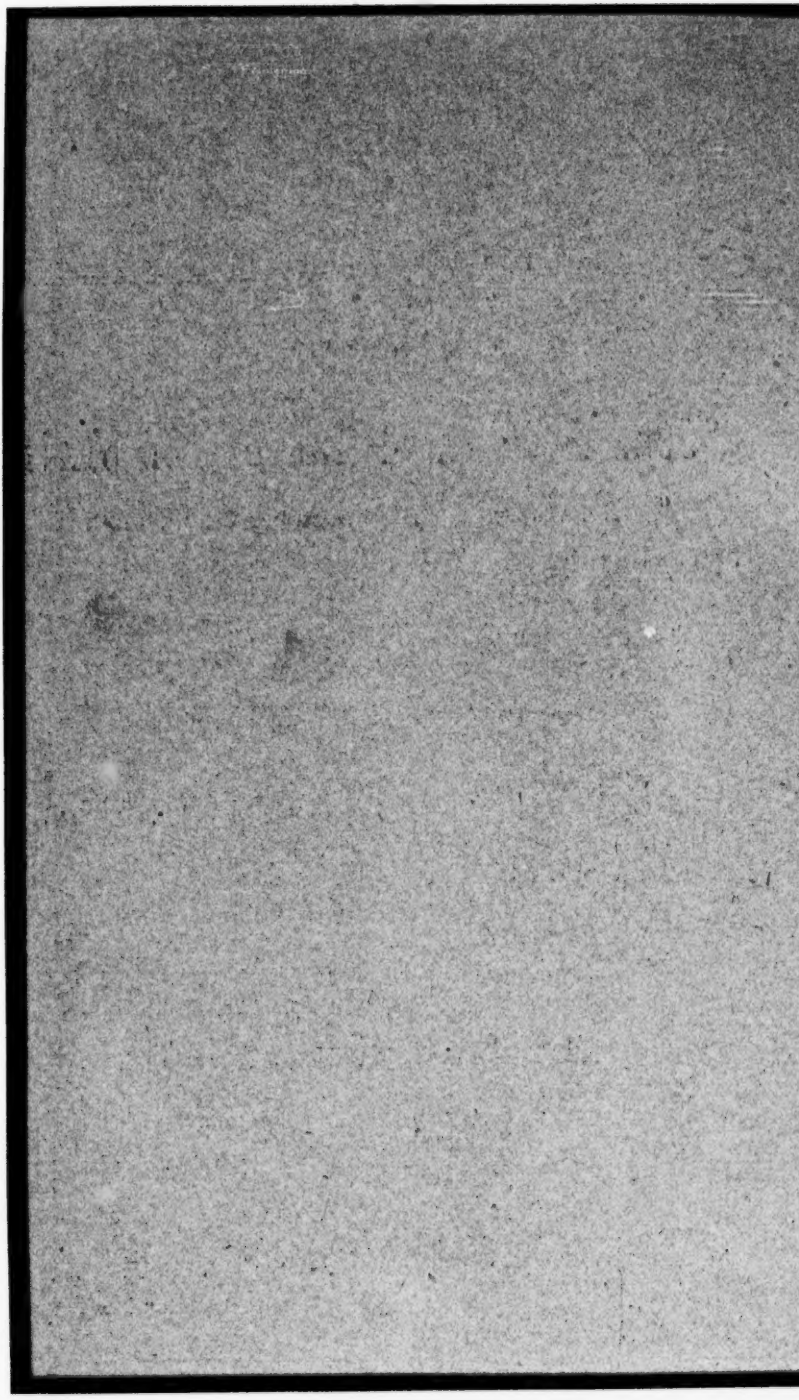
THE UNION STEAMBOAT COMPANY,

PETITIONER.

Brief for Respondent.

S. H. HOLDING,
F. S. MASTEN.

HARVEY D. GOULDER,
for Respondent



In the Supreme Court of the United States.

No. 12, Original. October Term, 1899.

EX PARTE IN THE MATTER OF
THE UNION STEAMBOAT COMPANY,
PETITIONER.

BRIEF FOR RESPONDENT.

The return made by the District Court fully and concisely states the ground of his action and reasons why the prayer of the petition ought not be granted. A statement of facts would be but a repetition of the return, which seems unnecessary except in connection with the consideration of the points raised by the petition and return, which are as follows:

I. The rate of interest.
II. The costs in the United States Circuit Court of Appeals.
III. The division of damages to the ships and the payment of the cargo damage.

I.

The Rate of Interest.

The language of the mandate that the decree should be

"With interest at the same rate per annum that decrees bear "in the courts of the State of Michigan,"

is susceptible of but one interpretation. The statutes set up in the return show that decrees in the Michigan Courts bear interest at the rate of seven per cent. The question is fully discussed in the brief filed by Mr. Canfield and will not be reargued here.

II.

The Costs in the United States Circuit Court of Appeals.

Respondent's decree provides that

"the said libelant recover of the said claimant and its surety "$276.75, as one-half of the costs of said cause in the Supreme "Court, and also one-half of all costs of said cause in this court "and in the United States Circuit Court of Appeals for the "Sixth Circuit."

The language of the mandate is:

"the claimants of the Conemaugh and the claimant of the "New York each to pay one-half of all costs in this cause. "And that the said Erie & Western Transportation Company "recover against the Union Steamboat Company $276.75 for "one-half of the costs herein expended and have execution "therefor."

The decree entered accords literally with the direction of the mandate.

When it comes to payment of costs, if Petitioner has paid all of the costs in the United States Circuit Court of Appeals, the Erie & Western Transportation Company's recovery may be reduced by an amount equivalent to one-half of said costs. The costs must be settled in court; the court has power to and would adjust the amounts. A deduction of the excess from Libelant's recovery in its own right, or remitter by Libelant after payment, fully meets any question of the character, and a writ of mandamus is unnecessary.

III.

The Division of Damages to the Ships and the Payment of the Cargo Damage.

The damages, as shown for convenience in the stipulation filed by proctors for the New York, are as follows, interest being included to July 3d, 1896:

Erie & Western Transportation Company, Libelant, Damage to Conemaugh....		$30,508.46
Erie & Western Transportation Company, Trustee, Damages to its *cestuis que trust*, underwriters on cargo who did not intervene and appear in their own behalf.....	$19,627.67	
The four underwriters who intervened after the trial in the District Court.....	19,841.56	
Total damage to cargo	$39,469.23	
Union Steamboat Company, Claimant, Damage to New York.....		$4,341.80

Neither the opinion nor mandate of this court deal with amounts. They have to do only with the rights of the different parties and interests.

The mandate directs the court

"to enter decree in conformity with the opinion of this court."

Looking to the opinion, it finds both vessels in fault and specifically directs that the underwriters on cargo are entitled to recover against the New York the full amount of their damage, notwithstanding the Conemaugh may also be at fault for the collision. Thereupon a decree against the New York for the full amount of the damage of the underwriters on cargo in the sum of $39,469.23 was entered; and as to the claims of the owners of the two vessels, respectively, $30,508.56 and $4,341.80, the court divided these damages and decreed in favor of the Erie & Western Transportation Company for $13,083.89.

In view of the fact, as will be more fully presented, that there was really no cross-libel in this case, it may be questioned whether in this feature of the decree the court should not have ignored the New York's damage and given a decree for half the damage to the Conemaugh without diminution; but this is a matter of which the Petitioner cannot complain. Subject to this criticism of the decree, the rule of division was applied to the only damage that can in any sense be said to have been presented or litigated in this cause so far as either the Conemaugh or her owner in its own right are concerned.

We submit, also subject to this criticism, that the action of the District Court follows the mandate and opinion of this court, which contains no direction warranting any other action. For that court to have gone further and sought to impose either upon the Conemaugh, which is not and never has been a party to the suit, or upon her owner, which never has been in this case charged with any liability in respect to cargo damage, would have been outside of the mandate and unwarranted either by the mandate, by the opinion of this court, or by the pleadings in the case.

Proctors for Petitioner presented to the District Court a form of decree claimed to be in conformity with the opinion of this court and as required by the mandate, but which plainly fails in these

respects; and now, not insisting on this form of decree, the Petitioner is in the position of seeking under writ of mandamus, not the ministerial execution of the mandate and opinion of this court upon the case which was tried, but to secure affirmative relief never heretofore claimed or set up in the manner prescribed by law and the rules of practice.

Baldly stated, the Petitioner now for the first time suggests that this court declare an abstract general proposition of law and give the Petitioner the benefit of the result, regardless whether it is applicable to the facts in the case or whether it affects a trustee or its *cestuis que trust*, and this even though it should result in the rendition of a judgment for a large sum against a party who has not been heard.

We respectfully submit that this is not the office of mandamus, and that a sufficient answer to the question why a decree was not entered dividing the entire loss between the Erie & Western Transportation Company and the New York is found in the fact that such a question has never been litigated in this case; that no basis has ever been furnished for litigation or decision of that question; that as to that loss, the Erie & Western Transportation Company which has a perfect defense to any such claim in behalf of the underwriters on cargo, was never a party, was never charged with any liability and never given an opportunity to set up its defense. So far as the Conemaugh is concerned, she is not and never has been a party to this case in any character; even the cross-libel which asserted only the New York's own damage having been abandoned.

Following the terms of the writ, however, it becomes necessary to consider the question why a decree should not be entered which should divide between the Erie & Western Transportation Company and the Petitioner equally

"the total damages arising out of said collision."

The answer of the New York set up the fact that she had sustained some damage, and inasmuch as the decree entered does divide equally the damages sustained by the Erie & Western Transportation Company and by the Petitioner, the question may be broadly stated :

Why should not the decree provide that one-half the damage to the Conemaugh's cargo be paid by the Erie & Western Transportation Company?

From Respondent's return, the following reasons appear :

1. The cargo damage was claimed of the New York, and this Honorable Court, upon the case as made, held that the full damage was recoverable from the New York, notwithstanding the Conemaugh may also be in fault for the collision.

2. The propeller Conemaugh was not impleaded and was not before the court.

3. The Petitioner did not exercise its right to have either the Conemaugh or the Erie & Western Transportation Company made party defendant under General Admiralty Rule 59, so as to be answerable to the claim of the cargo owners or underwriters ; nor does the Petitioner's answer claim "set-off or recoupment" in respect thereof in case the New York be found in fault, or in any manner refer to that claim.

4. To charge the Erie & Western Transportation Company with one-half the cargo damage, to-wit, $19734.61, would not only recoup against its own recovery in another right a claim upon which it was never impleaded and so never had the opportunity of presenting its special defense, but would require an affirmative decree against it in excess of its own recovery, which is not directed by this Honorable Court, or permissible under the pleadings in the case.

5. If Petitioner has any right against the Erie & Western Transportation Company by reason of damage to cargo, since it was not set up, in absence of specific authority from this court, it cannot be determined in this litigation.

6. Respondent had no authority to determine the right of the Petitioner to claim against the Erie & Western Transportation Company, or to hear any special defense to such claim from the Erie & Western Transportation Company without new pleadings, for which Respondent could find no warrant in the mandate.

Upon these facts and quite aside from the opinion of the court herein, we submit, as will be more fully presented later, that the case of

The Beaconsfield, 158 *U. S.*, 303,

is decisive of the question adversely to the prayer of the petition; but answering Petitioner's brief:

The libel presented two distinct causes of action in behalf of two distinct parties.

The Erie & Western Transportation Company asserted against the propeller New York a claim in its own right for its own damage, and, as trustee, asserted an entirely distinct claim for the damage to its *cestuis que trust*, the owners of and underwriters on cargo. All of the cargo was insured so that the trusteeship is simply for the underwriters on cargo.

A cross-libel was indeed filed, which was definitely limited to the claim for damage to the New York, with the ordinary prayer for process and for security to answer the claim thereof, as provided by General Admiralty Rule 53, but no process was issued upon it, no copy of it was served, no order for security was entered or sought; the Conemaugh was never required to and never did answer it. Indeed, no proceedings whatever were had thereon except a formal dismissal by the District Court from which no appeal was taken. As far as the record in the cause shows, the cross-libel was simply filed and abandoned. The case, therefore, stands on libel and answer as if the cross-libel had never been filed.

> "Beyond doubt, the final decree dismissing the libel in the "cross-suit determines that the libellant in that suit is not "entitled to recover affirmative damages for any injuries suf- "fered by his vessel in the collision; but it does not dispose "of the issues of law or fact involved in the original suit. "Instead of that, both parties in the cross-suit, if no appeal is "taken from the decree in that suit, are remitted to the plead- "ings in the original suit; and it is undeniable that every issue "in those pleadings is open to the parties, just the same as if "no cross-libel had ever been filed."
>
> *The Dove*, 91 *U. S.*, 381, *at* 384.

Certain of the cargo underwriters intervened after the hearing in the District Court, but without affecting the issues or the status of the cargo claim; they made no new allegations, raised no new issue but simply continued in the right against the New York

asserted by libelant as their trustee, so that their right is precisely that of the other underwriters who remain strictly as libelant's *cestuis que trust.*

The rights of the cargo owners or underwriters are the same whether they appear in their own right or by trustee. The right of the ship owner to proceed as bailee and trustee against an offending ship or party for damage to cargo of his vessel has been repeatedly recognized. He may do this in an action in which he also claims damage on his own behalf, and the right so asserted in the character of trustee for the cargo interests is as perfect in behalf of the *cestuis que trust* and the relief against the party charged as extensive as if the cargo owners or underwriters appear in their own right.

A citation of authorities is unnecessary. This court has repeatedly recognized the right to so proceed, and the right of the owner so suing as trustee for cargo damage to "recover the whole damage to the cargo" in a case where by reason of contributory fault he can only recover a *moiety* of the damage to his vessel.

The Beaconsfield, 158 U. S., 303, at 307.

> "The owners of the schooner have an undoubted right to "sue on behalf of the owners of the cargo for its value. It "would seem that so suing, their rights as bailees must be as "great as if the owners of cargo joined as libelants. No final "decree should, therefore, it seems, be made which will give "the libelants a smaller amount as bailees than the owners of "the cargo would be entitled to receive."

Leonard vs. Whitwill, 10 Ben., 638; F. C. 8261.

Under the opinion of this court herein, (according with the settled law,) the underwriters on cargo have relief against the New York as the only party ever impleaded or charged in this case with that liability, to the full amount of their damage, $39,469.23. By virtue of their personal intervention, $19,841.56 of this is payable to the underwriters who intervened, and the balance, $19,627.67, to the trustee, the Erie & Western Transportation Company, but necessarily "in trust," for the underwriters on cargo who did not intervene and relieve libelant of the trust.

The Erie & Western Transportation Company has and can have no interest in this sum. It is not subject to offset or to any claim, recoupment or reduction, from any cause on account of the

Erie & Western Transportation Company; it does not belong to that company but to its *cestuis que trust*. As a trust fund it is in no way to be charged with the obligations of the trustee. Of this trust relation the Petitioner has had knowledge at every step in the case. It appears from the libel, in the computation of damage before the Commissioner, in his report and its confirmation and in the decree on the trial in the District Court. The Petitioner here sets it out definitely, in accordance with the real state of the case, by its stipulation, showing in convenient form the various items of damage, and it finally appears in the decree proposed in behalf of Petitioner.

The trust fund must be kept intact.

Division is here applicable only to the Damage Suffered by the Ships themselves.

As has been argued, the claim for loss of cargo, even though prosecuted by the owner of the carrying ship as trustee, is distinct and separate from the claim of such owner for his own damage, quite as much so as if the owner of the carrying ship had never come into the case for any purpose.

It may be stated as a general proposition that where two vessels in collision are at fault, all resulting damage should be divided or apportioned between them. Surely this is no more than a general abstract principle of law, which cannot, more than any other principle, be ruthlessly applied regardless of all forms of procedure, of the pleadings in the cause and of special circumstances which govern the application of general principles. When therefore, one ship only is proceeded against for the damage to cargo, that party charged and given his day in court in respect to the claim of liability can alone be properly decreed to pay.

> "The peculiar principle of apportioning the damages in col-
> "lision between the two vessels, when both are in fault, applies
> "only to the damages suffered by the vessels themselves. It
> "does not apply to the claim of the owner of cargo on board
> "the libelant's vessel or of the owner of a vessel being towed.
> "Where the suit is brought against only one of two vessels
> "and both are adjudged to be in fault, the libelant is entitled

"to recover in full the amount of his damages without regard "to the right of apportionment between the two vessels in "fault."

Henry's Ad. Pr., Sec. 77.

"Goods shipped as cargo, and their owners, as in the case "before the court, are innocent of all wrong; and the owners "of the cargo may sue the owners of one of the ships, or both, "and they may sue at law or go into the admiralty, at their "election, and, having proved their case, they are as much "entitled to full compensation in the admiralty as they would "have been if they had elected to pursue their common-law "remedy, saved to them by the proviso contained in the ninth "section of the Judiciary Act, 1 Stat., 77.

"Co-wrongdoers, not parties to the suit, cannot be decreed "to pay any portion of the damage adjudged to the libelant, "nor is it a question in this case whether the party served may "have process to compel the other wrongdoers to appear and "respond to the alleged wrongful act."

The Atlas, 93 U. S., 302-317.

The Continental authorities on division accord with this.

"The case of division established by Art. 10 is an exception "which is applicable to *vessels* only, without embracing mer-"chandise."

Emerigon, Chap. XII, Sec. 14, p. 334.
See ref. The Bristol, 29 Fed., at 874.

This is not an arbitrary rule but rests in justice and reason. The cargo owner is innocent of wrong, and the party in fault charged with his loss must, as to the cargo owner, pay in full. The wrong of the carrying ship is neither imputed to the cargo owner nor impressed upon his goods. If but one of several joint wrongdoers is called upon to pay, he must make compensation in full and look to the other wrongdoers for their proportion.

The Juniata, 93 U. S., 337.

The statement made in the brief for Petitioner (p. 13) that there can be no contribution among *tort feasors*, is erroneous. This in the first place overlooks the distinction between joint and concurrent *tort feasors*. The wrong not being willful, contribution may be had in a proper case. Whether and how the right may be lost is not germain to this discussion. As we shall contend, and as argued more fully later on, it was the duty of the Petitioner, which

was distinctly impleaded and charged, to bring in the Erie & Western Transportation Company or its vessel under Rule 59, if it desired to raise the question that in case of its own fault being found, a part of that damage should be charged to that Company or its vessel.

Under the last cited authority, in computing the division, only that damage is to be included which the parties themselves have suffered. Where one has been called upon to pay in full to or on account of a third person, the question then becomes one of apportionment between the wrongdoers themselves. We submit that in dividing the damage suffered by the parties themselves, and decreeing full payment to the cargo against the New York, Respondent complied with the letter and the spirit of the opinion of this Honorable Court.

An affirmative decree may not be rendered against the Erie & Western Transportation Company for the difference, between one-half of its own damage and one-half of the aggregate damage with which petitioner seeks to charge it, and petitioner may not at this stage and in the state of this case have relief by way of recoupment or otherwise.

As shown in Petitioner's stipulation, the damage of the Conemaugh is $30,508.45, of the New York, $4,341.80, of the underwriters on cargo, $39,469.23, an aggregate of $74,319.49. One-half the total damage, therefore, is $37,159.74, exceeding the damage sustained by the Erie & Western Transportation Company in its own right by $6,651.28. The decree entered by the District Court divides the damages of the Conemaugh and the New York, giving a decree to the Erie & Western Transportation Company of $13,083.33. To assess the damages equally, as prayed for in the petition herein, would require a further direct and purely affirmative decree for $6,651.28 either against the Conemaugh, not herself a party, or against the Erie & Western Transportation Company, not charged by any one with cargo damage, after first absorbing under the name of recoupment the $13,083.33 awarded in the decree of the District Court to that interest.

Again submitting that the decree entered by the District Court follows categorically the mandate and opinion, we will consider the two elements of this question in their order.

First—Affirmative Decree, Pure and Simple.

In the form of decree presented on behalf of the New York, to which we may refer for illustration, the ruling consideration seemed to be to leave the New York liable for one-half the gross damage regardless of how the other half might be provided for. It required the New York to pay directly into court about one-half the cargo damage, being that represented by those cargo underwriters who intervened. It then commingled the damage awarded the Erie & Western Transportation Company in its own right with the cargo damage of those underwriters for whom the libelant continued to act as trustee, although the rights of all the cargo underwriters are identical before the law, and all stand in the same right.

It then provided that the Erie & Western Transportation Company, for itself and as such trustee, recover one-half of this amount, less one-half of the amount so to be paid directly by the New York and less one-half the New York's own damage, and that the resultant sum be paid into court or to the proctors for the Erie & Western Transportation Company. Without burdening the argument with the various amounts, the result is that there would be thus paid into court or to the proctors for the Erie & Western Transportation Company, a sum less by $6,651.28 than the amount of the cargo damage. This deficiency is unprovided for in the proposed decree and must so continue unless the District Court should of its own motion enter up a decree for that amount against some other party than the New York, notwithstanding the express holding of this court that they are entitled to recover their full damage against that vessel.

But dismissing the particular form of decree presented on behalf of the Petitioner, which clearly does not at all meet the requirements of the mandate and is only considered by way of illustration. It will not do either to commingle the cargo damage directed by this court to be decreed against the New York with the damage directly sustained by the New York and consider these two together as constituting her damage; there is no warrant for such a method. But this would make an aggregate of $43,811.03, and the damage of the Erie & Western Transportation Company in its own right being but $30,508.46, the only way in which the prayer of the petition could be carried out by this method would require the same distinctively affirmative decree for one-half the difference,

$6,651.28, against the Erie & Western Transportation Company or its steamer Conemaugh.

The underwriters on cargo never impleaded either the Conemaugh or the Erie & Western Transportation Company, nor was either impleaded in respect of this claim under Rule 59 or in any manner. The record exhibits the bill of lading referred to in the Respondent's return, which contains stipulations precluding a recovery of any of this damage by them against the Conemaugh or her owner. Clearly, for both or either of these reasons, no decree could be rendered in their behalf. But the Petitioner is in no better case. It has never made any claim for damages against either the Conemaugh or her owner. The Petitioner in its answer does not even refer to the cargo damage, it does not speak of the damages in the case generally; the only allusion in the answer to any damage whatever is contained in the statement that the New York was somewhat damaged about her stem. The cross-libel has already been considered. It was abandoned; its formal dismissal was not appealed from and it is effectually out of the case. But even in that pleading the Petitioner made no mention whatever either of cargo damage or of damage generally by the collision, but in a brief paragraph mentioned the damage to the New York and stated the amount. Subsequently, however, we stipulated the amount of this damage, and it was before the court, if at all, by the allusion to such damage in the answer and our consenting that it be considered, without which, even that element of damage might not have been considered by the court.

The Sapphire, 18 Wall., 51-56.

The admiralty is not without rules of procedure and standards of practice. In a case where by agreement of the parties the answer was to stand as a cross-libel, this court said :

> "Respondents in a pending libel have the right, in a proper "case, to institute a cross-libel to recover damages against the "libelants in the primary suit; but they should file their libel, "take out process, and have it served in the usual way; and "when that is done, the libelants in the first suit regularly "become respondents in the cross-libel, and, as such, they must "answer or stand the consequences of default. Regularity in "pleading is both convenient and essential in judicial investiga- "tions, and such departures from the usual practice as are "exhibited in this record ought not to receive countenance."

Ward vs. Chamberlin, 21 How., 572-574.

There being no cross-libel and Petitioner not having set up this damage or referred to it in its answer, it cannot have an affirmative decree.

The Dove, 91 U. S., 381-384.
Kennedy vs. Dodge, 1 Ben., 311 F. C., 7701.

"In a libel for collision the respondent cannot obtain a decree "for damages in excess of those sustained by the libelant, "unless he has filed a cross-libel."

Ebert vs. The Reuben Doud, 3 Fed., 520.
Gillingham vs. Charleston Towboat Co., 40 Fed., 649-651.
The Ciampa Emilia, 39 Fed., 126.

The function of a cross-libel in admiralty is very similar to that of a cross-bill in equity, without it affirmative relief cannot be given.

Washington Railroad vs. Bradleys, 10 Wall., 299.
Wood vs. Collins, 60 Fed., 139.
White vs. Bower, 48 Fed., 186.

Manifestly, under the pleadings, Respondent could not enter a decree calling on the Erie & Western Transportation Company to pay to cargo underwriters $6,651.28, or to pay that sum to Petitioner, as would be necessary if the cargo damage found due to the underwriters from the New York shall be treated *when paid* as part of the damage to the New York.

Second--Affirmative Relief by Way of Recoupment.

It is true that before the promulgation of Rule 59, there being no rule of practice which enabled the parties to bring before the court by appropriate pleadings all necessary parties and present and have heard all issues necessary to a full determination of the rights of the parties, the various courts, in order to avoid multiplicity of actions and protect the parties, undertook to work out the rights under a system of "rustic justice." The necessity for resorting in collision cases to any latent equity power of the court was entirely removed by the adoption of the 59 rule. Even before the adoption of that rule, exercising the authority given by the 46th rule, to regulate their own modes of procedure in the absence of specific provision by Congress or the Supreme Court, it will be found that the courts adopted and pursued this system, not only in the name but for the purposes of justice.

It will not be found that affirmative relief by way of recoupment or otherwise was given to a party who submitted no claim of any sort, but stood upon a simple denial of liability until after hearing in a court of last resort, and then sought to assert such claim against another party who has a special defense thereto, but upon which he may not be heard.

The only case that we are aware of in which the precise question has been considered in this court is that of the *Beaconsfield*, which we think fully and definitely recognizes the force of the 59th rule.

The court said, p. 307 [158 U. S.]:

> "and in case he (the cargo owner) proceed against one only, "and both are held in fault, he may recover his entire damages "of the one sued. A person, who has suffered injury by the "joint action of two or more wrongdoers, may have his "remedy against all or either, subject, however, to the condi- "tion that satisfaction once obtained is a bar to any further "proceeding. The Atlas, 93 U. S., 302, 315; Lovejoy vs. "Murray, 3 Wall., 1. Did the case rest here, there could be "no doubt of the right of the libelant to recover the whole "damage to the cargo of the Britannia, although, as owner of "the Beaconsfield herself, Cleugh could recover only a moiety "of his damage to the vessel, in case the collision were ad- "judged to be the mutual fault of both vessels."

Then, after alluding to and considering Rule 59, which was complied with in that case, by the filing of such petition as we claim should have been filed in this case to predicate the right of recoupment, the court says (309):

> "Had no petition been filed against the Beaconsfield by the "French Company, the case would have stood quite differently, "and there would have been no suit against the Beaconsfield "upon which a decree could have been rendered."

The decree of this court in the present case that the cargo underwriters are entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh may also be in fault for the collision, stands upon the same principle. After quoting (175 U. S., 210) from the case of *The Atlas*, language supporting the proposition that a plaintiff suffering a loss by the negligence of two parties, is at liberty to sue both or either, and if without fault is entitled to judgment in either case for the full

amount of his loss, the Court further quotes with approval from the same case :

> "Co-wrongdoers not parties to the suit cannot be decreed to "pay any portion of the damage adjudged to the libelant, nor "is it a question in this case whether the parties defeated may "have process to compel the other wrongdoers to appear and "respond to the alleged wrongful act."

In support of this proposition the Court also refers to the case of

The Juniata, 93 U. S., 337.

There Pursglove filed his libel against the Juniata for damage to his tug and for personal injuries ; the United States also libeled the Juniata. Both the Juniata and the tug were held in fault. Pursglove recovered half his damages, property and personal, against the Juniata ; the United States being without fault recovered full damages against the Juniata. Although Pursglove was before the court suing and had decree against the Juniata, yet, as neither he nor his tug had been made a party to the claim of the United States, this Court there required the claimants of the Juniata to pay the full damage to the United States, and on the question of claimants' right to recoup or have such relief as petitioner is here seeking, said (340):

> "Whatever their rights may be against Pursglove, by reason "of such payment of more than one-half, must be settled in "another proceeding. It cannot be done in this litigation."

We submit, therefore, that the prayer of the petition for a division or other decree than such as was rendered would be contrary to established law and contrary to the explicit directions of the Court in this case.

To apply the sum awarded the Erie & Western Transportation Company in its own right as a credit on the sum to be paid by the New York under the decree of this court, is unwarranted.

The difficulty with the contention of the Petitioner throughout is that the case has never been put in a position for accomplishing or warranting this kind of relief, and under the particular facts, as shown in the record and the return, no such result can be accomplished without grave injustice to the Erie & Western Transportation Company.

To give affirmative relief against the Erie & Western Trans-

portation Company on a claim as to which, without fault on its part, it has not had its day in court, or to take its property to satisfy such claim in whole or in part, would violate the company's constitutional right. It may not be deprived of its property without due process of law.

Whatever difficulties there may have been before the 59th Rule, and however the courts may have been required then to work out the equities of the parties, since its adoption the difficulties are met and the practice certain.

That rule prescribes a definite course of procedure, to bring every claim and issue and, if necessary, other parties before the court, with opportunity to set up any and all pertinent claims and defenses and have complete adjudication of the rights of all concerned.

Besides some cases in the lower courts in which the equities were worked out before the rule was adopted and which will be briefly considered later, the brief for Petitioner refers to two cases in this court :

The North Star, 106 U. S., 17, and
The Chattahoochee, 173 U. S., 540.

To these may be added for this consideration,

The Manitoba,, 122 U. S.

These cases have no bearing whatever on this case. In each the party against whom recoupment would operate invoked the protection of a public statute, and by that act by operation of the law, made himself and any reclamation claim arising from the disaster *party defendant* in the case as to all the damages, or as to the particular claim, with fullest opportunity to present any special or other defense, and asked the court for final and complete adjudication of every question so that the resulting decree should be conclusive upon all parties.

Referring, however, to the cases specifically. The question in the *North Star* was, When can a party thus invoking the benefit of the act have it applied to his liability, before or after that liability is adjusted upon such full consideration of the particular facts in the case as shall enable the court to fix the *ultimate* liability of the party ? It was not necessary to consider any

such question as we have in this case, because by his own act in invoking the aid of the statute, the party had brought into the case every issue, the determination of which was necessary to the ascertainment of such ultimate liability.

In the *North Star* case there was no question of cargo damage. This came up for consideration in the case of the *Manitoba*, but aside from the consideration above stated, such a question as we have here could not arise. The *Manitoba*, under the decree of the District Court and as affirmed, was held liable for one-half of the total damage. There was no occasion for any recoupment, because the bond given on her release in the limited liability proceeding was less than a *moiety* of the damages in the case, and a decree was rendered for the amount of the bond.

The case of the *Chattahoochee* is a similar authority. It also states the broad general principle of division of damages. The precise manner in which the question was brought before the District Court does not appear, but it does appear that in the course of the proceedings in the District Court the libelant himself at some stage of the trial and before final decree presented to that court for adjudication a question, the elements of which are these :

Both vessels are found in fault ; here is cargo damage as well as damage to the schooner; under the general law, the schooner would be held to pay one-half the cargo damage, which, the schooner having been lost, might be deducted from the recovery for her own damage ; but the Harter act exonerates the carrying vessel from this liability, and the cargo owner must forego this *moiety* of his loss unless, perhaps, the steamer should pay the whole. The limited liability act was also referred to.

Here were of necessity presented every question and every element of every question necessary to the full and final disposition of all the rights, affirmative and defensive, between the cargo owner and the owners of both ships in such manner that the decision of the court thereupon must be final and conclusive as to all the parties. In what particular manner they were thus presented is immaterial to any question that he might raise on the subject. Therefore, in this case, as in the other cases, we find no consideration of the question raised here.

Clearly, when a party has thus had his day in court upon the question of the cargo claim and its effect upon him, he cannot be

heard to complain that the trial court did decide upon this essential element of the case presented. In each of these cases the very thing happened which we assert is necessary before a person's property may be taken to pay a claim; to wit: that the party to be charged be given an opportunity to present any defense he may have to that claim.

Of the earlier cases cited in Petitioner's brief, perhaps the strongest is

The Eleanora, 17 Blatchf., 88, F. C., 4335,

where two separate libels were filed, one for the vessel, the other for the cargo; both vessels were held at fault. In delivering the opinion, Chief Justice Waite, on circuit, said:

> "Both vessels being in fault, as between themselves, the "damages must be apportioned. Castner and others, who sue "the Eleanora alone for the cargo, are entitled, under the rule "in this case of The Atlas, 93 U. S., 302, to a decree for the "full amount of their loss; and, as the Transit, if she had "been joined, would have been liable for one-half this loss, a "credit may be allowed the Eleanora, on the decree in favor of "the owners of the Transit, for a sum equal to one-half of the "damages to the cargo. Although separate libels were filed by "the owners of the vessel and the owners of the cargo, they "constitute, in effect, but a single suit. They have been heard "together and submitted on the same evidence. Having all "parties before it, *the court may do what it would have done "if there had been but one libel, that is to say*, divide the dam- "ages of the collision throughout between the two colliding "vessels. A formal claim, to that effect, on the part of the "Eleanora, is not necessary. It is rare that, in any case, a "defending vessel makes a demand for a division of damages. "A complete defense is generally insisted upon in the plead- "ings, and the apportionment is made by the court, on the "facts as they are finally developed at the hearing. It is un- "necessary to decide what the rule in this particular would be "if the Eleanora had not been subjected in the suit for the cargo, "because here she has been, and that, too, upon the very tes- "timony submitted in the suit between the two vessels. The "fund belonging to the Transit, growing out of the collision, "is in court, and *no injustice is done* by using it to re-imburse "the Eleanora for what she had paid for the Transit, on ac- "count of the mutual fault of the two vessels."

In this case it would almost seem that the Chief Justice had the impression that if the claim for the cargo damage and for damage to the carrying vessel were presented in the same libel, they became amalgamated into one claim, subject to the same limitations.

In The C. H. Foster, 1 Fed., 733,

in which limitation of liability was also involved, the cargo damage was ordered paid into court first, and then, a decree entered which should show that one-half that sum was included in the damage of the ship paying, with leave to amend the libel setting up that damage if the parties thought desirable.

In The Hercules, 20 Fed., 205,

Judge Lowell, recognizing that the carrying ship might have a defense against the claim of its cargo owner, if it were charged with that damage, said :

> "It is true that the question whether the schooner is excused "from liability to the owners of the cargo shipped on board of "her, has not been brought into the case ; and, therefore, if "there is any ground for relieving the owners of this liability, "they may show it by supplementary proceedings in the "cause. If they shall make no move in that direction within "30 days, the decree will be that the claimants have the right "to recoup from the damages found against them, and in "behalf of the owners of the schooner, one-half of the amount "found due the owners of the cargo."

Judge Lowell, by such order, gave to the carrying ship the right she is entitled to—opportunity to defend.

Treating these cases in a group. The decisions formulating the right were made before the promulgation of the 59th Rule. The later ones are on the authority of these without consideration. As before stated, this system was employed in the interests of justice. In no one of these, nor in any case cited in Petitioner's brief do we find that the court adjudicated the claim of the carrying ship's cargo against that ship any more than against the other offending ship or against any third party without giving such party an opportunity to be heard on the question of his liability.

It was doubtless to correct this deficiency in the admiralty procedure and to avoid the haphazard disposition of this question that the 59th Rule was adopted, furnishing a standard of practice and procedure competent to bring the question in an orderly way before the court. Rule 46 as well as section 918, Rev. St., provides that the Circuit and District Courts have power to regulate their practice and procedure only in those respects in which it is not controlled and regulated by statute or rule of the Supreme Court. The necessary result of this is that where the Supreme Court does by rule establish and command a certain course of procedure, any other is excluded.

Speaking of these rules, this Court said :

> " They are little more than a recognition and formulation of " the previous practice of courts of admiralty in this country " and in England. They have come before this court in several " instances and have always been treated as obligatory."
>
> *The Corsair, 145 U. S., 335, 342.*

It was held by Judge Wilkins that where these rules prescribe a course they are exclusive of any other.

> *The Illinois, Brown's Adm., 13; F. C., No. 7003.*

We can only understand the expressions of the court in *The Beaconsfield* as stating this doctrine. In that case the claim was by the owner of the carrying ship for damage to the ship in his own right and as trustee for the cargo owners. The original claimant of the ship proceeded against filed a petition in conformity with Rule 59 to bring in the libelant's vessel, the *Beaconsfield*, as a defendant to the claim asserted as trustee for the cargo owner. In this connection the court said, p. 309 :

> " When the Beaconsfield was drawn into the litigation by " the petition of the French company, and his own vessel thus " made to respond to his libel, Cotton should have either with- " drawn from the suit, and asked that Sanbern be substituted, " or in his answer to the petition of the French company " should at least have set up any defense he might have had " against the owner of the cargo, arising under the bill of lading " or from any other cause. If the attention of the court had then " been drawn to the fact that Cotton was occupying inconsis- " tent positions, it would doubtless have ordered the owner of

"the cargo to be substituted for him as libelant. Had no "petition been filed against the Beaconsfield by the French "company, the case would have stood quite differently, as "there would have been no suit against the Beaconsfield upon "which a decree could have been rendered."

This is the present case; no petition was filed, and libelant recovers full damages for its *cestuis que trust*, underwriters on cargo, but by reason of its fault, only a *moiety* of its own damage. There is no suit against the Conemaugh or her owner in which a decree can be rendered. If the Petitioner, as claimant of the New York, has any claim against the Conemaugh or her owner by reason of her payment of cargo damage, having failed to put itself in a position to determine that here, it must be relegated to a separate action.

We submit that the reasons set up in the return for not entering the decree prayed for in the Petition herein are sufficient, and the petition should be dismissed.

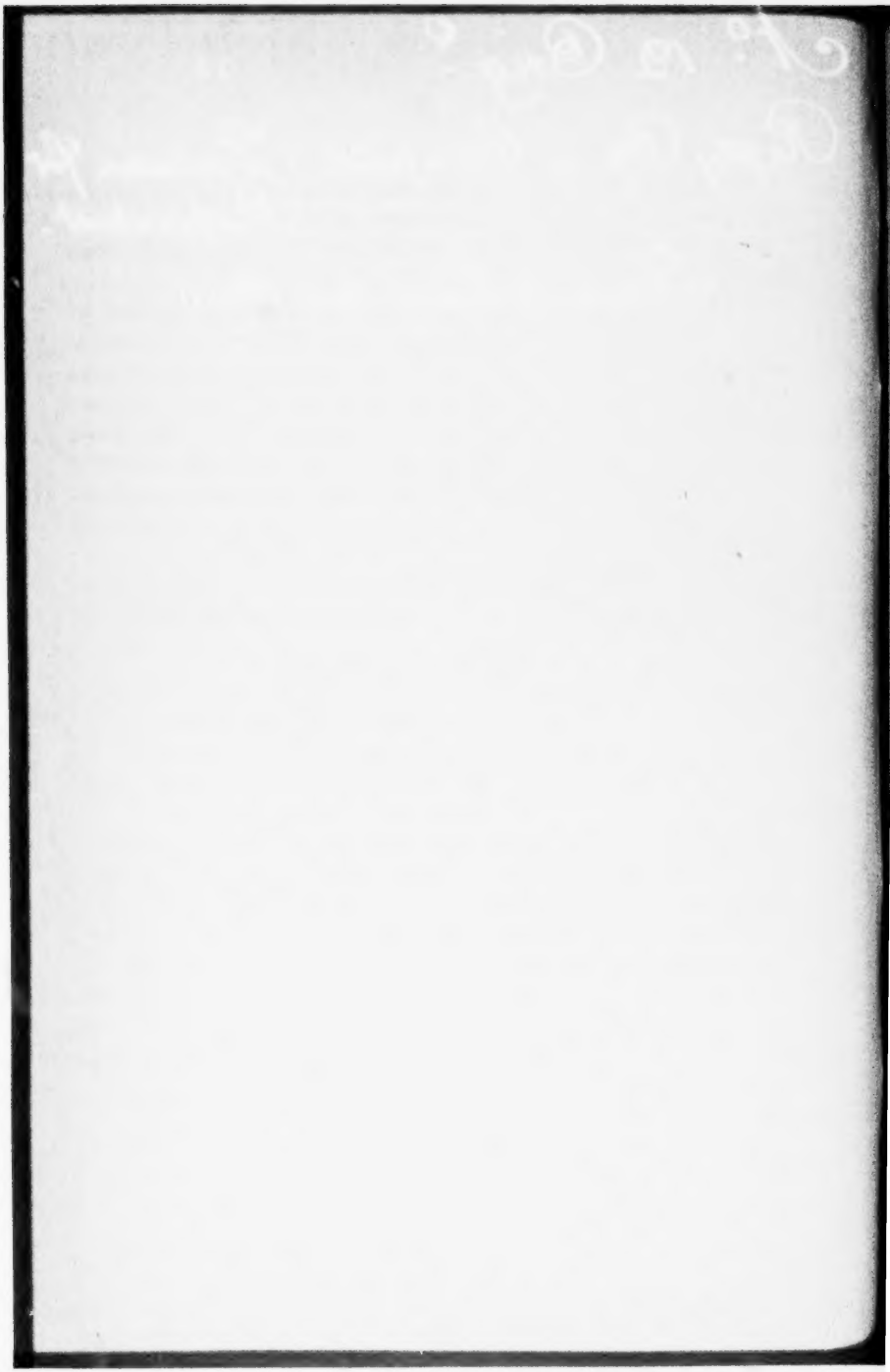
Respectfully submitted,

HARVEY D. GOULDER,

Counsel for Respondent, and Proctor for Erie & Western Transportation Company, and its *cestuis que trust*.

S. H. HOLDING,
FRANK S. MASTEN,
Of Counsel.

Cleveland, O., May 15, 1900.



No. 12 Orig.
Reply Br. of Canfield & Goulder for Respondent

FILED
MAY 16 1900
JAMES H. McKENNEY,
Clerk.

Filed May 16, 1900.

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 12, Original.

EX PARTE: **IN THE MATTER OF THE UNION STEAMBOAT COMPANY, PETITIONER.**

BRIEF FOR RESPONDENT IN REPLY.

FRANK H. CANFIELD,
HARVEY D. GOULDER,
For Respondent.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 5-16-1900

IN THE

Supreme Court of the United States.

No. 12, Original.

EX PARTE: IN THE MATTER OF THE PETITION OF THE UNION STEAMBOAT COMPANY FOR A WRIT OF MANDAMUS.

Oral argument not having proceeded, the court gave leave to respondent to file this memorandum, because Petitioner's reply brief, filed May 14th, may be considered to contain its arguments upon the answer of Respondent to the order to show cause.

I.

We submit that Petitioner's counsel, in their brief, have wandered far from the issue involved in this proceeding, which is, whether respondent, in entering the decree under the mandate of this court, has obeyed that mandate.

They may be said to summarize their whole argument on page 5, in these terms:

> "The objection made here is purely technical. All "the equities in the case can be settled here now, as "the parties in interest are all before the court.
>
> "It can be of no practical interest or benefit to "supply further pleadings. All the defenses that "have not been made can still be made before the "decree is entered."

And so, instead of discussing the issue involved or attempting to point out wherein the mandate of this court has been disregarded, petitioner's counsel discuss the case as though it were now before this court on a new appeal or rehearing.

The argument disregards the facts: That this is an original proceeding to which neither the Erie and Western Transportation Company, its *cestuis que trust*, its steamer *Conemaugh*, or the underwriters, who intervened, are parties; that the collision cause on the merits has been tried and remanded and the decision thereon has become the law of the case and a decree has been entered in the district court; that it is not an appeal or a rehearing, but a proceeding, special in its nature, to inquire only whether the respondent did or did not enter the decree as ordered.

There is no issue as to what effect the bill of lading under which the *Conemaugh's* cargo was being transported would have on the underwriter's claim if it had been made against the Erie and Western Transportation Company or the *Conemaugh*, nor how the bill of lading may affect the *New York*. These questions have not been litigated solely because the petitioner, for some reason of its own, has elected not to have them litigated, although it was entirely within its power to have them determined in the cause without prejudice to its general defense.

II.

It is well settled that the duty of the respondent was simply to obey the mandate and not to add to or vary what this court ordered to be done. It was the respondent's duty simply to render strict and unqualified obedience to the mandate; or, in other words, to enter a decree in strict accordance with what this court had decided.

Ex parte Washington & G. Ry, 135 U. S., 554.

Not dealing with amounts but fixing only the rights of the parties, this court decided:

1. That both the *Conemaugh* and the *New York* were in fault for the collision.

2. That the underwriters on the *Conemaugh's* cargo are entitled to recover their full damages from the *New York*.

3. That the costs of the case should be equally divided between the respective owners of the two vessels.

4. That interest should be awarded at the same rate that decrees bear in the courts of the State of Michigan.

An examination of the decree entered and of the respondent's return or answer shows that decree to be in strict compliance upon all of these points with the opinion, in which not only is there no mention of any right of recoupment, which was therefore excluded from consideration by the respondent, but in connection with and in extension of its decision that the underwriters on cargo recover in full from the *New York*, the court referred to cases which establish in what circumstances a party so paying a third party in full must be relegated to his separate action for contribution.

III.

As already suggested, petitioner's counsel do not attempt to point out wherein the decree does not conform with the opinion.

An instance of disregard of the real point is in the treatment of the damage of the underwriters on cargo: The petitioner had presented to the respondent a form of decree (Exhibit X, page 7, answer) providing direct recovery against the *New York* of full damages for those cargo under-

writers who had intervened; and for the others who, without intervening, stood in the same right as *cestuis que trust* of the libellant, the only provision made was for payment into court or to proctors of a sum about two-thirds the amount of these cargo underwriters' damage, with no provision for the balance or direction as to disposal of this much. Now, here the brief argues in respect to all underwriters on cargo, that they are entitled to nothing or, at best, but one-half their damages; the brief urging that, without apt pleadings (page 5), "as all the parties in interest are before the court," "all the defenses that have not been made can still be made before the decree is entered"—or, with new or amended pleadings, which (page 18) they crave leave to file, such further proceedings, including setting aside the present decree, may be had.

All this notwithstanding the decision of this court, for the respondent the law of the case, and that the inquiry here is solely as to whether, in the decree already entered, the respondent complied with the opinion of the court that the underwriters on cargo recover in full of the *New York;* emphasized as that was by reference to the case of the *Juniata.*

IV.

We may be pardoned reference to a single further instance, the suggestion (page 8) that a defense on the contract or bill of lading is one that must come from the libellant; that when the interveners filed their petitions, the libellant should have answered them.

What argument may properly be made in this proceeding on such a proposition is not apparent, but it might be so construed as to prove misleading.

These interveners made no charge of fault or liability and set up no claim against the *Conemaugh* or her owner, but adopted the charges against the *New York,* and, as did those who

remained *cestuis que trust*, proceeded so exclusively against the *New York* that when the circuit court of appeals held the *New York* free from fault and the *Conemaugh* solely at fault, it also found, necessarily, that this disposed of all claims of underwriters on cargo and all were dismissed accordingly.

The respondent's answer that there was no claim against or impleading of the *Conemaugh* or her owner on any cargo claim is therefore correct.

The argument proceeds on some theory that the admiralty procedure is so loose and unscientific that the status of a party, whether plaintiff or defendant, whether charged with sole liability or with none, is immaterial, so that in any capacity or in any relation he is a party in the case.

This is in direct conflict with the opinion—the law of the case under which the respondent acted, as well as with the *Juniata* and the *Beaconsfield*, and seems to grow out of a confusion of the principle requiring a first determining of the ultimate liability in statutory cases like the *North Star*, the *Chattahoochee* and the recent *Dumois*, in which latter the owners of each vessel applied for the limitation and all interveners were impleaded in both these proceedings.

V.

The petitioner is not asking that its proposed decree be entered, nor (from the course of argument) is it asking for the enforcement of the mandate issued in the cause as tried. To grant what it asks would necessitate recalling the mandate and the revision or reversal of the law of the case.

It is not a question of what this court might or should have decided, or what it would decide on other issues or under new or different pleadings. The petitioner had its choice of remedies. It might have had a remedy by cross-libel or independent action; it might have proceeded by petition under rule 59; or it may

even be conceded, as suggested in the *North Star* case before the rule was adopted, that it would have been enough to have claimed in its answer recoupment in case it be found at fault. Differing from the rule in cases where a party is applying for statutory relief from liability, in the ordinary case none of these are compulsory, but at a defendant's option. It elected not to make the claim by cross-libel, petition, or even answer and is bound by its election.

Ward vs. Fellers, 3 Mich., 281–293.

Even if this were a proper time, place and proceeding to urge such indulgence as is prayed, it ought not to be granted. It is not permissible for a party to try a cause through on a theory under which it saw no necessity for claiming recoupment although the procedure was ready at hand, and then after final adjudication seek to open it and get the benefit of a remedy it did not even care to assert. With full knowledge of the circumstances, with the remedy at hand, it made its election and there is no hardship in leaving it there.

We respectfully submit that the respondent executed the mandate in strict accord with the direction and should be sustained.

F. H. Canfield,
H. D Goulder,
Counsel for Respondent.

Ex parte THE UNION STEAMBOAT COMPANY.

ORIGINAL.

No. 12. Original. Submitted May 14, 1900.—Decided May 28, 1900.

Where this court in a collision case directed a decree dividing the damages as between the two vessels, and allowing to the owners of the cargo of one vessel a full recovery against the other vessel; and the court below, upon the production of the mandate of this court, refused to permit the latter vessel to recoup against the other one half the damages to the cargo, it was held that the remedy was by a new appeal and not by *mandamus* from this court, no disobedience of the mandate being shown.

THIS was a petition for a writ of mandamus to the District Court for the Eastern District of Michigan, commanding it to set aside a decree entered in the case of *The New York*, 175 U. S. 187, and enter a decree dividing the damages equally, so that petitioner would not be decreed to pay more than one half the total damages arising out of the collision between the New York and the Conemaugh, with interest thereon not exceeding five per cent per annum.

Upon the opinion of this court in the case of *The New York* being filed, a mandate issued that the decree of the Court of Appeals be reversed, and the case remanded to the District Court, with direction "to enter a decree in conformity with the opinion of this court, with interest at the same rate per annum that decrees bear in the State of Michigan." Upon the case coming on to be heard in the District Court, the petitioner, the Union Steamboat Company, owner of the propeller New York, submitted a decree to the effect that both vessels were in fault for the collision, and that the damages resulting therefrom be equally divided between the Erie and Western Transportation Company, owner of the Conemaugh, and the Union Steamboat Company, owner of the New York; that such damages amounted in all to the sum of $74,319.49, of which certain intervening underwriters of the cargo were entitled to, and recovered from the Steamboat Company, $19,841.56; that

the Transportation Company, as trustees for the underwriters and owners of the cargo of the Conemaugh, not intervening, suffered damages in the sum of $19,627.67; that, as owner of the propeller, it had suffered damages in the sum of $30,508.46, aggregating the sum of $50,136.13; that the Transportation Company recover of the petitioner one half of $50,136.13, less one half the sum of $19,841.56, decreed to be paid to the intervening petitioners, etc.

The court, however, declined to enter this decree; refused to permit the petitioner to recoup any sum that it might pay to the owners or underwriters of the cargo of the Conemaugh, from any sum that was due from the Steamboat Company for damages sustained by the Conemaugh, so that such company was compelled to pay of the total damages about seventy-six per cent instead of fifty per cent thereof.

Mr. C. E. Kremer, *Mr. H. C. Wisner*, *Mr. F. C. Harvey* and *Mr. W. O. Johnson* for petitioners.

Mr. Harvey D. Goulder, *Mr. S. H. Holding*, *Mr. F. S. Mast* and *Mr. Frank H. Canfield* for respondent.

Mr. F. H. Canfield filed a brief for Intervening Underwriters.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Petitioner applies for this writ of mandamus upon the ground that the District Court refused to enter a decree in conformity with the opinion of this court dividing the damages, but in effect entered a decree imposing upon the Union Steamboat Company, the petitioner, about seventy-six per cent of the damages occasioned by the collision.

The duty of an inferior court upon receiving the mandate of this court is nowhere better described than by Mr. Justice Baldwin in an early case upon that subject, *Ex parte Sibbald v. United States*, 12 Pet. 488, 492: "Whatever," said he, "was before the court, and is disposed of, is considered as finally

settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution, according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; or intermeddle with it, further than to settle so much as has been remanded. . . . If the special mandate, directed by the twenty-fourth section, (of the judiciary act,) is not obeyed or executed, then the general power given to all courts of the United States to issue any writs which are necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law, by the fourteenth section of the judiciary act, fairly arises, and a mandamus or other appropriate writs will go," although an appeal will also sometimes lie. *Perkins* v. *Fourniquet*, 14 How. 328, 330; *Milwaukee & Minnesota Railroad Co.* v. *Soutter*, 2 Wall. 440, 443. See also *Boyce's Executors* v. *Grundy*, 9 Pet. 275; *Ex parte Dubuque & Pacific Railroad*, 1 Wall. 69; *Durant* v. *Essex Co.*, 101 U. S. 555; *In re Washington & Georgetown R. R. Co.*, 140 U. S. 91; *City Bank* v. *Hunter*, 152 U. S. 512; *In re City National Bank*, 153 U. S. 246; *In re Sanford Fork & Tool Co.*, 160 U. S. 247; *In re Potts*, 166 U. S. 263.

It is equally well settled, however, that such writ, as a general rule, lies only where there is no other adequate remedy and that it cannot be availed of as a writ of error. *In re Pennsylvania Co.*, 137 U. S. 451; *In re Morrison*, 147 U. S. 14, 26; *Ex parte Railway Co.*, 103 U. S. 794; *Ex parte Baltimore & Ohio R. R. Co.*, 108 U. S. 566; *In re Atlantic City R. R.*, 164 U. S. 633. The inferior court is justified in considering and deciding any question left open by the mandate and opinion of this court, and its decision upon such matter can only be reviewed upon a new appeal to the proper court; *In re Sanford Fork & Tool Co.*, 160 U. S. 247, 256, and the opinion of this court may be consulted to ascertain exactly what was decided and settled. *West* v. *Brashear*, 14 Pet. 51; *Supervisors* v. *Kennicott*, 94 U. S. 498; *Gaines* v. *Rugg*, 148 U. S. 228, 238, 244; *Sanford Fork & Tool Co.*, 160 U. S. 247, 256.

The libel in this case was for a collision between the Cone-

maugh and the New York. The only questions decided were as to the respective faults of the two vessels, and the claim of the underwriters upon the Conemaugh's cargo, that they were entitled to a recovery to the full amount of their damages against the New York, notwithstanding the Conemaugh was also in fault for the collision. This claim was sustained, and directions given to enter a decree in conformity to the opinion of this court. Such decree was entered, dividing the damages between the two vessels, and awarding to the underwriters of the cargo a full recovery against the New York. It may be true that the decree holds the New York liable for seventy-six per cent of the entire damages and not fifty per cent, but this results from the fact that she was primarily held for the entire value of the cargo. The equal division applied only to the vessels, and upon the other hand if petitioner be entitled to the recoupment claimed, it would, apparently, result in an affirmative decree in its favor. But no question of recouping one half of such damages to the cargo from the moiety of damages awarded the Conemaugh was made by counsel or passed upon by this court. It is now insisted that, under the cases of *The Chattahoochee*, 173 U. S. 540, and *The Albert Dumois*, 177 U. S. 240, this should have been done. This may be so; but it is an entirely new question, quite unaffected by the case of *The New York*, and if the court erred in refusing to allow such recoupment, the remedy is by appeal and not by mandamus. Perhaps a mandamus might lie to review the allowance of interest, but that may also be considered on appeal.

No disobedience of the mandate having been shown, the petition must be

Denied.